Supreme Court, U.S.
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No.

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Respondent,

v.

ROBERT NAMER, NATIONAL BUSINESS CONSULTANTS, INC., NAMER, INC., AMERICA FIRST COMMUNICATIONS, INC., VOICE OF AMERICA, INC., FRIENDS OF ROBERT NAMER,
Petitioner.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the jurisprudence of the First Circuit Court of Appeals in *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997) and *United States v. Rostoff*, 164 F.3d 63 (1st Cir. 1999) and the dissent of the Second Circuit case of *NLRB v. EDP Medical Computer Systems, Inc.*, 6 F.3d 951 (2nd Cir. 1993), applies, or whether the contrary jurisprudence of the Fifth Circuit, in *United States v. Phillips*, 303 F.3d 548 (5th Cir. 2002), and the Fifth Circuit's opinion in the present case, *FTC v. National Business Consultants, Inc., et al*, 376 F.3d 317 (5th Cir., June 25, 2004, *rehearing denied* August 2, 2004), applies, as there is a true and clear split of opinions and authority among and between the United States Circuit Courts for the First and Fifth Circuits.

2. Whether the Government, through its agency, the Federal Trade Commission, is entitled to utilize the provisions of the Federal Debt Collection Procedure Act, 28 U.S.C. 3001, *et seq*. (FDCPA) to conduct judgment debtor rules and examinations and enforce collection and executions under its money judgment rendered against defendants on November 8, 1991, and Amended Judgment of April 8, 2003.

3. Whether the Government's said judgment of November 8, 1991, and the underlying claims therein, which were the subject of the Government's lawsuit, constitute a "debt" under the provisions of the Federal Debt Collection Procedure Act, 28 U.S.C. 3001, 3002.

4. Whether the Government's said judgment of November 8, 1991, "prescribed by the lapse of ten years", without re-inscription, as provided in Article 3501, Louisiana Civil Code, and Article 2031, Louisiana Code of Civil Procedure.

5. Whether the court had the statutory right and authority to review transfers of assets by and business relationships of Mr. Namer under the FDCPA.

6. Whether the court, acting on its own and without any motion or request from the Government, had the statutory right to add parties-defendant and make them judgment creditors and responsible for the said judgment of November 8, 1991, and subject them to enforcement, collection and execution thereunder, as decided in the said Findings of Fact, Conclusions of Law and Order to Show Cause, rendered January 27, 2003, and the Amended Judgment, rendered April 8, 2003.

LIST OF ALL PARTIES TO THESE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption:

Petitioners:

1 Robert Namer

3. National Business Consultants, Inc.

4. Namer, Inc.

5. America First Communications, Inc.

6. Voice of America, Inc.

7. Friends of Robert Namer

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There is no parent or publicly-held company owning ten percent or more of the corporations' stock.

TABLE OF CONTENTS

Page

Questions Presented for Review. i

List of All Parties to the Proceeding and Corporate Disclosure Statement. iii

Table of Contents. v

Table of Authorities. vii

Opinions Below. 1

Basis for Jurisdiction in this Court. 1

Pertinent Statutes. 1

Statement of the Case. 1

Argument/Reasons for Granting the Petition. 16

Conclusion. 29-30

Appendix

Appendix A
Fifth Circuit Court of Appeals, Opinion on Petition for Rehearing Dated August 2, 2004 ..... 1a

Appendix B
Fifth Circuit Court of Appeals, FTC v. National Business Consultants, Inc., et al, 376 F.3d 317 (5th Cir. 2004), Case Number 03-30282, filed June 25, 2004 ..... 1b

Appendix C
United States District Court for the Eastern District of Louisiana, Order and Reasons, Dated April 3, 2003, 2003 WL 1797891 (E.D.La.) 1c

Appendix D
United States District Court for the Eastern District of Louisiana, Findings of Fact, Conclusions of Law and Order to Show Cause, Dated January 27,2003 ..... 1d

Appendix E
United States District Court for the Eastern District of Louisiana, Amended Judgment, Dated April 8, 2003 ..... 1e

TABLE OF AUTHORITIES

Cases Page

Federal Trade Commission v. Figgie International, Inc., 994 F.2d 595 (9th Cir. 1993) 16

United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997) i,2,16,20,21,22,23,24

United States v. Phillips, 303 F.3d 548 (5th Cir. 2002) i,3,16,23,24

United States v. Rostoff, 164 F.3d 1999 ..... i, 3,16,22,23

Statutes and Rules

Federal Debt Collection Procedures Act. ..... *passim*

Mandatory Victims Restitution Act 22

15 U.S.C. 45(a), 53(b) 1,11

15 U.S.C. 57(b) 1,2,3,4,10,19,24,25

15 U.S.C. 57b(b) 2,11,17

18 U.S.C. 228 20

18 U.S.C. 3556, 3663 19

28 U.S.C. 1291 1

28 U.S.C. 3001 ..... i,1,11,18,30

28 U.S.C. 3002 ..... i,6,18,30

28 U.S.C. 3002(3) 11, 21, 23

28 U.S.C. 3002(3)(A) 19

28 U.S.C. 3003(3)(B) 21,22,23

28 U.S.C. 3012 28

28 U.S.C. 3013 28,29

28 U.S.C. 3015 11

28 U.S.C. 3201 11,25

28 U.S.C. 3301, 3304 27

Rules

Fed. R. Civ. P. 54(b) 1

Fed. R. Civ. P. 69 11,18,25

OPINIONS BELOW

The opinion to be reviewed by this Honorable Court is the United States Court of Appeals for the Fifth Circuit case of *FTC v. National Business Consultants, Inc., et al*, 376 F.3d 317 (5th Cir. 2004), Case Number 03-30282, filed June 25, 2004, *rehearing denied* August 2, 2004.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction, pursuant to 28 U.S.C. §1241(1), Rule 10, particularly Rule 10(A), and Rule 16, Supreme Court Rules, to review the final decision of the United States Court of Appeals for the Fifth Circuit, rendered June 25, 2004, Case Number 03-30282, entitled *FTC v. National Business Consultants, Inc., et al,* 376 F.3d 317 (5th Cir. 2004). Petition for Rehearing was denied August 2, 2004. This petition for certiorari is timely in that Petitioner has filed it within ninety (90) days of August 2, 2004.

PERTINENT STATUTES

Federal Trade Commission Act, 15 U.S.C. 45(a), 53(b) and 57b.

Federal Debt Collection Procedure Act, 28 U.S.C. 3001, *et seq*.

STATEMENT OF THE CASE

In accordance with Rule 14, 1 (g)(ii), the basis for federal jurisdiction in the district court and the Court of Appeals for the Fifth Circuit, was the Federal Trade Commission Act, 15 U.S.C. 45(a), 53(b) and 57b; and 28 U.S.C. 1291, and Rule 54(b), Federal Rules of Civil Procedure. *United States v. Phillips*, 303 F.3d 548, 550 (5th Cir. 2002).

This petition involves review of the district court's enforcement of a $3,019,377.00 Judgment, rendered on November 8, 1991, for alleged violations of the franchise rule, Federal Trade Commission Act, 15 U.S.C. §57(b). More specifically, the Government and the district court utilized the provisions of the Federal Debt Collection Procedure, 28 U.S.C. 3001, *et seq.*, to collect the judgment against petitioners/defendants, even though any amounts collected under the judgment must be paid over to private parties under 15 U.S.C. §57b(b). Petitioners have consistently taken the position that the subject of this Judgment, and the Amended Judgment of April 8, 2003, does not constitute a "debt" due to the United States, as requisite under the FDCPA, 15 U.S.C. §3001 *et seq.*, for utilization of that Act against movers; whereas, the Government claims that the Judgment is covered by the Act. This conflict is of national and monumental significance, because, if petitioners are correct, and the Government, district court and the Fifth Circuit are mistaken, the Government will have no collection remedies against petitioners, as the Judgment will have expired by operation of law. As presented by petitioners, Congress has not provided for collection of this type of cause of action under the FDCPA. And, only Congress can provide such a remedy, which it has not done under the clear terms of this Act. On the other hand, if movers are incorrect, then the Fifth Circuit has provided what is tantamount to legislative relief to the Government, because such relief is absent under the clear terms of the Act.

Most importantly to the granting of this petition, there is a clear split of opinion and authority among the United States Circuit Courts. Petitioners have advanced the authority of the First Circuit Court of Appeal, in *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), and *United States*

v. Rostoff, 164 F.3d 63 (1st Cir. 1999), which, by obvious application, would require an inquiry into the ultimate recipient of the collection, i.e., the consumers, private parties and alleged victims of the alleged franchise rule violation, with the result that the judgment and subject of this lawsuit would not be a debt covered by the FDCP A. Contrariwise, the Fifth Circuit has relied on its own authority of *United States v. Phillips,* 3030 F.3d 548 (5th Cir. 2002), and specifically declined to adopt the First Circuit's reasoning. (*FTC v. National Business Consultants, Inc., et al*, 376 F.3d at Page 319, fn.2. This unreconciled conflict between the First Circuit Court of Appeals and the Fifth Circuit is ripe for review and resolution by this Honorable United States Supreme Court. Otherwise, the FDCPA would apply to non-criminal redress to private consumers in the Fifth Circuit, but not in the First Circuit.

The on-point and well reasoned dissent in *NLRB v. EDP Medical Computer Systems, Inc.*, 6 F.3rd 951 (2nd Cir. 1993), provides further impetus for acceptance of writs by this Honorable United States Supreme Court.

The Fifth Circuit also failed to recognize that the entire amount of the judgment must be paid over to the consumers, by its own terms and the provisions of 15 U.S.C. §57(b). No portion of this judgment may statutorily or otherwise be kept by the Government. Yet, the Fifth Circuit stated, "a portion" of the Judgment may ultimately be paid to the private parties. *FTC v. National Business Consultants, Inc., supra*, 376 F.3d at Page 320. This is clearly incorrect, as evidenced by the fact that the Government has admitted that the $150,000 that has been collected has been forwarded to the private consumers. The only amounts due to the Government, separately, stem from a separate award for attorney fees and costs, in the amount of $239,624.00.

Because the FDCP A does not apply to this non-governmental debt, all of its enforcement provisions are not available to the Government. For that reason, the district court lacked authority, unilaterally, and on its own motion, to dispense with due process of law, service and citation of the complaint and any amended complaints, all discovery provided under the Federal Rules of Civil Procedure, and join additional defendants with its amended judgment of April 8, 2003. This is yet another conflict with the applicability of the FDCPA, which must be resolved by this Honorable Court. The district court and the Fifth Circuit, in effect, permitted the Government to sidestep garnishment proceedings, which would restrict seizure and collection to amounts held by third parties, and, instead, incorporated them as whole defendants for the whole judgment. The district court never sought, nor made any review of the financial records of any of the joined additional defendants. It was impossible for the district court to arrive at any fair conclusion that there was any diversion of funds that would have obstructed the government's collection of funds due it without obtaining some sort of information. This was wrong.

The following facts are pertinent.

On April 19, 1989, the Federal Trade Commission, an agency of the United States, as plaintiff (hereinafter referred to as the Government), filed its Complaint for Permanent Injunction and Other Equitable Relief against defendants, National Business Consultants, Inc., a Louisiana corporation, and Robert Namer, individually and personally. The Complaint demanded injunctive relief and redress to private parties as a result of alleged violations of the Federal Trade Commission Act, as provided in 15 U.S.C. 57(b). (Vol. 1, Doc. 1, Pg.293) The Government's Application for a Temporary Restraining Order and other relief were granted on April 20, 1989, when the district court issued its

Temporary Restraining Order with Asset Freeze and Order to Show Cause Why a Preliminary Injunction Should Not Issue. (Vol. 1, Doc. 7, Pg. 80) By Order issued April 27, 1989, the Government's Application for Preliminary Injunction and Other Relief was granted and a preliminary injunction was issued against defendants along with an asset freeze and other relief requested by the Government. (Vol. 1, Doc. 17, Pg. 11)

Defendants filed their Answer and other responses on May 22, 1989, denying the Government's allegations of liability, asserting defenses of jurisdiction, failure to state a claim, prescription, lack of constitutionality, and also filed therein a counter-claim for damages. (Vol. 2, Doc. 41, Pg. 470)

Trial on permanent injunction liability commenced on July 5, 1989, and concluded on July 28, 1989. (Vol. 6, Doc. 121 A, Pg. 1645) The court rendered judgment in favor of the Government and issued the permanent injunction and asset freeze and gave oral reasons. (Vol. 6, Doc. 147, Pg. 1457) By Judgment, Findings of Facts and Conclusions of Law, rendered March 19, 1990, the district court provided its full reasons for the findings of liability and permanent injunctive relief. (Vol. 14, Doc. 258, Pg. 2909) The court also denied the defendants' Motion to Dismiss and assigned reasons. This Judgment set forth the facts found by the court in the trial on the merits, declared the violations committed by defendants, as alleged and proven by the Government, and re-confirmed the issuance of the permanent injunction and asset freeze. The court did not decide the issue of money damages for the consumer redress part of the Government's Complaint and Demand.

The record shows that a Notice of Appeal of the March 19, 1990, Judgment was filed on April 10, 1990, pro se by defendants, with the Clerk's notation that the filing fee

was "not paid". (Vol. 14, Doc. 268, Pg. 2730) In fact, the record will show that the defendants did submit payment by check, but the government froze the bank account, which caused the check to be returned. Upon information and belief, there is nothing in the record to show that the appeal was pursued by defendants. On March 21, 1990, the Government filed its Motion for Award of Consumer Redress on the Basis of Record Evidence, with related pleadings seeking a money judgment. (Vol. 14, Doc. 259, Pg. 2870) The defense objected and demanded a trial on the merits. (Vol. 14, Doc. 263, Pg. 2816)

After substantially more proceedings, the court rendered its Judgment and Opinion on November 8, 1991, based on the record and pleadings and without an additional trial, ordering and adjudging defendants liable for consumer redress in the amount of $3,019,377.00, plus pre-judgment interest, attorney fees and costs. (Vol. 21, Docs. 547, 548, Pgs. 5889, 5890) This money judgment for consumer redress and the Government's utilization of the collection procedures under the Federal Debt Collection Procedure Act, 28 U.S.C. 3002, *et seq*., to enforce the judgment form the basis for this appeal.

The amount of the judgment of November 8, 1991, consistent with the Government's pleadings and evidence, was calculated according to the amount that was paid by each alleged consumer victim, despite the fact that funds had been contractually returned to some consumers and a majority of the alleged victims submitted affidavits stating they sought no relief. The court found that each franchisee paid at least a $500.00 deposit as a condition to engage in the alleged business opportunities deceptively offered by the defendants. "Redress is due to each associate consultant and sales consultant who paid a 'performance deposit' of $500.00

or greater during the period from April 19, 1986, to the present. This includes all of such who failed to receive a disclosure statement in violation of the FTC's Franchise Rule, beginning three years before the FTC filed its Complaint in this action". (Vol. 21, Doc. 547, Pgs. 5899, 5901) The court found this to be consistent with jurisprudence ordering restitution in FTC consumer redress cases for "the purchase price of the relevant product or business opportunity, less any refunds or money owed". (Pg. 5901) The court based its judgment amount on evidence provided by the Government and was the exact amount suggested by the Government in its pleadings and exhibits. (Vol. 16, Doc. 312, Pg. 3462) The court did not find any contrary probative evidence submitted by the defendants to reduce the consumer redress award.

Realizing that a permanent injunction had previously been issued in another section of court on March 19, 1990, as set forth above, the court followed the November 8, 1991, Judgment with its Permanent Injunction Order, on November 18, 1991, to complete the record. (Vol. 21, Docs. 552, 553, Pgs. 5861,5865)

Defendants, pro se for Mr. Namer and with counsel on behalf of National Business Consultants, Inc., filed their Notices of Appeal for these Judgments and Orders of November 8 and November 18,19, 1991. (Vol. 21, Docs. 551, 556, Pgs. 5853,5870) By entry of February 20, 1992, the Fifth Circuit Clerk made entry that the appeal was dismissed "for want of prosecution for failure of appellants to pay $105.00 filing fee and to make financial arrangements with court reporter within the time fixed by the Rules..." (Vol. 21, Doc. 562, Pg. 5812) The record shows that the defendants did submit payment by check, but the government froze the bank account, which caused the check to be returned. After Magistrate hearings and pleadings filed by the parties, by Orders rendered April 28 and 30, 1992, the

district court denied defendants' motions for appeal *in forma pauperis*. (Vol. 22, Docs. 580, 583, Pgs. 6341, 6347) There is no evidence in the record, upon information and belief, that any other appellate proceedings were conducted on the district court's judgments of liability, issuance of the injunctions, and ordering defendants to pay consumer redress in the amount of $3,019,377.00.

On June 25, 1997, the Government filed its first Motion and Order to Examine Judgment Debtor, which was ordered for July 23, 1997. (Vol. 30, Doc. 773, Pg. 8927) The Government reported and it was so ordered that "the judgment debtor examination is SATISFIED". (Vol. 30, Doc. 776, Pg. 8913)

The Government filed a Second Motion and Order to Examine Judgment Debtor, on July 12, 2002, which was set by the court for July 17, 2002. (Vol. 30, Doc. 796, Pg. 8789) Defendant, Robert Namer, *pro se*, filed his Opposition to the Judgment Debtor Rule. (Vol. 30, Doc. 799, Pg. 8766) This was followed by the enrollment in the record of counsel for defendants, who filed defendants' Memorandum in Opposition to the Government's Motion for Judgment Debtor Examination. (Vol. 30, Docs. 813, 814, Pgs. 8704, 8713) The Government filed its Reply Memorandum, on November 19, 2002, and defendants filed their Supplemental Memorandum, on December 2, 2002. (Vol. 31, Docs. 824, 827, Pgs. 9110, 9122)

Mr. Namer gave sworn testimony on August 28,2002, in the Judgment Debtor Rule. (Vol. 31, Docs. 830, 831, Pgs. 9101, 9104) After several continuances, the Rule was continued to January 8, 2003, when it was concluded. (Vol. 31, Doc. 831) During these proceedings, defendants moved to recuse the district court judge, the Honorable Peter Beer.

On January 27, 2003, the district court issued its Judgment and Orders via Findings of Fact, Conclusions of Law and Order to Show Cause. (Vol. 31, Doc. 832, Pg. 9094) Based on the Judgment Debtor Rule and other proceedings, the court concluded that the said Judgment of November 8, 1991, for consumer redress in the amount of $3,019,377.00, constituted a "debt" owed to the United States and subject to the Federal Debt Collection Procedure Act. Virtually all of the court rulings were based on collection procedures under the Act (Pg. 9097)

Also under the FDCPA, the court claimed that there were certain asset transfers and business relationships of Mr. Namer and, unilaterally and without any motion from the Government, ruled that the court had the "plenary authority to add", as responsible and liable judgment debtors, entities that allegedly were involved in asset transfers and financial arrangements with defendant Robert Namer, to wit: Namer, Inc., America First Communications, Inc., Voice of America, Inc. and Friends of Robert Namer; and ordered these entities to show cause on March 11, 2003, "why they should not be named as parties to this matter and cast as judgment debtors under the Federal Debt Collection Procedures Act and/or Louisiana law." (Pgs. 9098, 9099) Defendants filed a Motion for Stay Pending Appeal, which was denied. (Vol. 31, Doc. 838, Pg. 9051) Defendants also filed their Memorandum in Opposition to Findings of Fact, Conclusions of Law, and Rules to Show Cause, on March 31, 2003 (Vol. 31, Doc. 846, Pg. 9013), which was opposed by the Government. (Vol. 31, Doc. 847, Pg. 9008)

Defendants filed their Notice of Appeal on February 25, 2003, from the court's rulings of January 8 and January 27, 2003. (Vol. 31, Doc. 839, Pg. 9049)

On April 2, 2003, the court conducted a hearing on the rule to show cause why the additional parties should not be named and included in these proceedings, and on the Motion to Stay. Neither the district court nor the government introduced any evidence or testimony to substantiate the court's claim of any transfers of assets, a claim that contained no specific incident, date or amount of any alleged asset transfers by any of the added defendants. The court then rendered its Amended Judgment, on April 8, 2003, ordering that the November 8, 1991, money judgment for consumer redress be amended to include Namer, Inc., America First Communications, Inc., Voice of America, Inc., and Friends of Robert Namer, as additional parties and judgment debtors, all liable jointly and severally. (Vol. 31, Doc. 851, Pg. 8987) There was never any motion by the Government to include these additional parties. They were included solely by the unilateral action of the district court. Upon information and belief, the court did not seek, review, or examine any financial records offered by Mr. Namer. Similarly, the court apparently disregarded Mr. Namer's letter of April 3, 2003, and referenced affidavits of April 2, 2003, by Namer, Inc., Voice of America, Inc., and America First Communications, Inc., filed in the record, which demonstrated that there were no improper or actionable asset transfers or inadequate consideration for services performed by Mr. Namer. (Vol. 31, Doc. 849, 8995-9007).

On June 2, 2003, defendants filed their Notice of Appeal from the Amended Judgment, which was coupled with the previous Notice of Appeal filed February 25, 2003. (Vol. 31, Doc. 853, Pg. 8982)

The enabling legislation and the causes of action for the Government's lawsuit against defendants are found in the Federal Trade Commission Act, specifically under 15 U.S.C. 45(a), 53(b) and 57(b). The authority of the Government to file such an action is specifically provided in 15 U.S.C

57(b), which permits the Government to file civil actions against parties who have committed unfair or deceptive acts or practices, with relief thereunder "to redress injury to consumers...". This redress may include "the refund of money or return of property...", "except that nothing in this sub-section is intended to authorize the imposition of any exemplary or punitive damages". 15 U.S.C. 57b(b). The Government has three years within which to file such proceedings. 15 U.S.C. 57b(b). It is clear from this statute, which forms the sole basis of the Government's Complaint, that the Government is limited in its statutory scope to actual money damages and refunds to victimized consumers, as well as injunctive relief. It was also clear from the statute that "exemplary or punitive damages" shall not be awarded in such a lawsuit.

In order to collect and execute under its winning judgment for redress to consumers, rendered November 8, 1991, in the amount of $3,019,377.00, against defendants/appellants National Business Consultants, Inc. and Robert Namer, the Government utilized the collection and enforcement procedures provided in the Federal Debt Collection Procedure Act, 28 U.S.C. 3001, *et seq.*; (hereinafter the Act) In particular, the Government utilized the judgment debtor discovery procedures of 28 U.S.C. 3015, and examined and cross examined Robert Namer at length. The Government also relied on the judgment lien provisions of 28 U.S.C. 3201, to create liens on defendants' property for the statutory duration of twenty years subject to one additional renewal. The said money judgment of November 8, 1991, must, in law and fact, be a "debt" due to the United States, as defined in 28 U.S.C. 3002(3), in order for the Government lawfully to utilize the Act and its collection tools.

The Government did not employ any collection procedures under Louisiana law, to which the Government would have been entitled. Rule 69, Federal Rules of Civil

Procedure. More particularly, the Government did not record its Judgment and re-inscribe or revive it prior to the passage often years, as provided in Article 3501, Louisiana Civil Code, and Article 2031, Louisiana Code of Civil Procedure. These State procedures gave the Government, as a judgment creditor in this state, ten years in which to execute under its money judgment, subject to renewals or revivals prior to the passage often years. The Government did not record and renew or revive the money judgment of November 8, 1991, prior to November 7, 2001, and has never done so. Accordingly, the only way the Government can execute on its judgment is to utilize the provisions of the Act, if it applies. According to the facts and nature of the Government's lawsuit and the underlying debt, the Act is not available to the Government.

The demands, prayers and causes of action set forth in the Government's original Complaint and all subsequent pleadings and procedures, as well as the judgments rendered in this case are two fold - injunctive relief with asset freezes and seizures and money damages for consumer redress. The first prong of the Government's lawsuit pertaining to injunctive relief was concluded with the issuance of the temporary restraining order, preliminary injunction and, finally, permanent injunction, along with numerous assets seizures and freezes and proceedings thereon.

The second prong, the money judgment for consumer redress, is still ongoing by virtue of the Government's attempts to execute and collect its said money judgment under the provisions of the Act. In connection with this second prong of the Government's lawsuit, i.e. money damages for consumer redress, there has never been any contention by the Government or in any judgment or ruling that any of the funds demanded by the Government would be paid to, kept by and inure to the benefit and coffers of the United States. The Government has never claimed and has expressed no intention that the consumer redress money damages belong

to the Government. Throughout these proceedings, the Government has consistently maintained that these damages are, in fact, owed to private individuals, who were victimized by the allegations proven by the Government, and who are owed refunds and damages from defendants. For example, the original Complaint specifically describes "consumer injury" and "substantial financial injury to numerous individual consumers" caused by defendants civil violations. (Vol. 1, Doc. 1, Pg. 299) The prayer therein clearly demands that defendants be found "jointly and severally liable for redress to all consumers who are injured as a result of defendants' violations of the Franchise Rule of Section 5(a) of the FPC Act..." (Pg. 301). (Emphasis added.) There has never been any other demand - all money damages for redress are demanded to be collected in the lawsuit and paid over to "all persons who were injured". This is not and was never intended to be the Government.

Other examples are as follows. In its Statement of Material Facts Not in Dispute, the Government described the funds and deposits made by the injured persons and the amount of loss suffered by them. (Vol. 5, Pg. 1193) It is clear that these calculated amounts are not fines or punitive in nature and they unequivocally do not constitute restitution in any criminal case, as there were no criminal proceedings. In the court's first definitive judgment on liability, on March 20, 1990, the court recognized the financial injury to the private consumers. (Vol. 14, Doc. 258, Pgs. 2912, 2915) In the Government's Motion for Award of Consumer Redress on the Basis of Record Evidence, with the Government's proposal to calculate economic redress for the consumers and obtain a judgment without the necessity of an additional trial on the merits, the Government specifically moved "that defendants be ordered to pay consumer redress.. ."; and, to order defendants to pay redress to injured consumers, totaling the amount paid to defendants by all franchisees since

April 19, 1986, less amounts received as refunds, calculated from defendants' business records... (Vol. 14, Doc. 259, Pgs. 2870, 2887) Consistently, in the FTC Supplemental Memorandum on the issue of consumer redress, the Government presented legal authorities supporting its claim for damages for consumer redress, the amount claimed to be supported by the evidence, $3,019,377.00; that the asset freeze be maintained "in full force and effect until defendants have completely satisfied their redress obligations"; that "redress to the injured franchisees is thus an appropriate remedy under Section 19(b)" of the FTC Act; and that "these defendants should be ordered to refund the money paid by the victims"; and also that "that defendants should be ordered to repay funds to their victims"; "defendants should now be ordered to pay redress to the victims of their deceptive practices". (Emphasis added.) (Vol. 16, Doc. 312, Pgs. 3462, 3463, 3468, 3469, 3475, 3476) Most importantly, the money Judgment and Opinion, November 8, 1991, granting the award of $3,019,377.00, is replete with specifications that this amount is for "relief/damages awarded for consumer redress". (Vol. 21, Docs. 547, 548, Pgs. 5889, 5906) The only money relief reserved for the Government was for reasonable fees and costs under the Act to be determined in further proceedings, which was in addition to the $3,019,377.00 award.

In sum, virtually all of the Government's demands, the judgments of the court, and all collection efforts for money damages were solely geared toward and intended for private consumer redress and not for any payments to the Government.

The Government moved to conduct its second judgment debtor rule, by motion filed July 12, 2002. (Vol. 30, Doc. 796, Pgs. 8789; Doc. 799, Pg. 8786; Doc. 814, Pg. 8704, and related pleadings) Over defense objections, Mr. Namer submitted to a sworn judgment debtor examination on August 28, 2002. (Vol. 38, Doc. 856) A substantial part of

this examination involved information regarding Mr. Namer's business relationships with and alleged transfers of assets to other entities, who were not parties to the proceedings.

During the course of the entire litigation, and particularly during the judgment debtor proceedings, the Government did not move or request to add additional parties-defendant as judgment creditors, including the business entities in which Mr. Namer was involved. Extraordinarily, however, the court on its own did so, as set forth in the court's Findings of Fact, Conclusions of Law and Order to Show Cause, January 27, 2003, and the Amended Judgment, April 8, 2003, over strenuous defense objections. (Vol. 31, Docs. 832, 851, Pgs. 8987, 9094) The Government made clear to the court that it had not added additional parties, when Government counsel told the court at the hearing on March 11, 2003, that "no additional corporations have been made defendants, so there was no action that the United States, at this point could take with respect to those corporations [referring to the parties added by the court, who are appellants herein.]". (Vol. 41, Doc. 855, Pg. 10)

Under the provisions of the Act, the court claimed to review certain transfers among the defendants and the other entities and declared that Mr. Namer made use of these entities in a wrongful manner. (Vol. 31, Doc. 832, Pg. 9098) Based on this statutorily infirm review, the court added the outside entities as defendants. The record clearly shows that the court did not seek, or have access to any of the financial records of any of the defendants to make any valid review or judgment.

Defendants then perfected their appeal to the United States Court of Appeals for the Fifth Circuit. After due proceedings, the Fifth Circuit affirmed the district court decisions and the Petition for Rehearing was denied.

ARGUMENT/REASONS FOR GRANTING THE PETITION

The Fifth Circuit's reliance on its own authority of *United States v. Phillips*, 303 F.3d 548 (5th Cir. 2002) is in clear conflict with the First Circuit's holding in *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), *United States v. Rostoff*, 164 F.3d 63 (1st Cir. 1999), and the dissent in the Second Circuit opinion of *NLRB v. EDP Medical Computer Systems, Inc.*, 6 F.3d 951 (2nd Cir. 1993). This Honorable Court must resolve this conflict between the circuits. For the following reasons, the fairness, reasoning and authority weigh in favor of reversing the Fifth Circuit's position and resolving this issue in favor of petitioner, in accordance with the authority of the other circuits.

The Judgment of November 8, 1991, fell squarely within the FTC Act and its grounds for recovery. The Judgment amount was calculated based on the deposits and purchase price paid by the consumers. There are no additional amounts in the Judgment.

In the similar case of *Federal Trade Commission v. Figgie International, Inc.*, 994 F.2d 595 (9th Cir. 1993), summary judgment was granted to the Government on the issue of liability, finding the defendant liable for dishonest or fraudulent practices, and setting a minimum and maximum amount of redress to be paid by the defendant. The amounts to be paid were calculated on the actual damages suffered by the consumers based on prices paid for the deceptively represented product. The district court ordered the defendant to pay the actual amount of gross revenues from the sale into a fund for distribution of the full refund price to customers. If the customers claimed less than that amount, then the excess would be paid to non-profit organizations.

The Ninth Circuit court upheld the district court's findings of liability. With regard to consumer redress, the

court found that only actual damages and redress may be collected under the FTC Act and paid over to the victims. The Act does not authorize payment of any additional amounts. Based on 15 U.S.C. 57b(b)... "there may be no redress without proof of injury caused by those practices. And the relief must be necessary to redress the injury." *Id.*, 994 F.2d at 605. This statute does not permit any portion of the redress to be punitive, so the court struck down the portion of the award that would be payable to the nonprofit organizations if not claimed by the victims. The principle is obvious - the victims are given dollar for dollar reimbursement for redress, but no additional amounts may be collected from the defendant. This latter situation would result in prohibitive exemplary or punitive damages. The court struck down the FTC's argument that the Government was entitled to keep the excess as a form of disgorgement. Very specifically for the definition of "redress", "[t]he word connotes making amends to someone who has been wronged". *Id.*, 994 F.2d at 607. The nonprofit beneficiaries were not parties who had been wronged and required amends. "The nonprofit organizations, recipients of fellowships, researchers, and educators who might receive the money under this portion of the order were not wronged by Figgie's deceptive sales methods... Congress expressly prohibited exemplary or punitive damages under Section 57b(b), so we know that its intent was not to punish deceptive trade practices, only to authorize redress to consumers and others for 'injury resulting' from the trade practice." *Id.* The nonprofit beneficiary portion of the award exceeded the boundaries of the statute. On the other hand, the court affirmed the summary judgment portion of the award authorizing the potential maximum amount of redress to be paid, in the event that consumers claim more than the minimum.

The Act and this apropos case define the nature of the November 8, 1991 Judgment of consumer redress in the amount of $3,019,377.00. This amount is statutorily limited

to reimbursement to the consumers, who were subjected to the alleged deceptive sales practices proven by the Government and adjudged by the court. There is no doubt whatsoever that this consumer redress award, and the statute on which it is based, can never, by law, be kept by or inure to the benefit of the Government, even though the Government, through the FTC, is the plaintiff.

The Government vested all of its collection efforts for payment of the consumer redress, as ordered by the said November 8, 1991 Judgment, in the enforcement provisions of the Federal Debt Collection Procedure Act, 28 U.S.C. 3001. The Government did not employ any other measures, such as available under Louisiana law for the recordation and revival or of judgments. Rule 69, Federal Rules of Civil Procedure; Article 3501, Louisiana Civil Code; Article 2031, Louisiana Code of Civil Procedure.

In order to utilize the enforcement provisions of this federal Act, the Judgment and its underlying claims must constitute a "debt", as defined in the Act. The enabling pertinent portion of the Act, 28 U.S.C. 3001, "provides the exclusive civil procedures for the United States -- to recover a judgment on a debt..." (Emphasis added.) Subsection (c) is most important, because it specifically reinforces the mandate that the Act "shall not apply with respect to an amount owing that is not a debt or to a claim for an amount owing that is not a debt". (Emphasis added.) This necessarily means that the Act only applies if there is a "debt", which is defined in 28 U.S.C. 3002, as follows:

> (3) "Debt" means-
>
> (A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or
>
> (B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service,

> sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States.

According to this statutory scheme, the said Judgment of November 8, 1991, must be a "debt", as defined therein, in order for the Government to benefit from its enforcement procedures. The first part of 18 U.S.C. 3002(3)A, does not apply, because the Judgment does not involve any type of loan or guaranty by the Government. The Government has the burden, therefore, to satisfy Section 3(B), and the list of applicable debts. This listing, alone, is enough to prohibit the Government's, the district court's, and the Fifth Circuit's use of the Act in these proceedings. The alleged franchise fees forming the basis of the Judgment were advanced by private consumers and, under 15 U.S.C. 57(b), as described above, consumer redress in the amount of the $3,019,377.00, is due back to them, and not to the Government. There is nothing in this statutory definition of "debt", which even remotely resembles this consumer redress. Further, the Judgment does not constitute a fine, penalty or restitution, because the present case is not a criminal prosecution, which would give rise to criminal restitution in connection with sentencing. 18 U.S.C. 3556, 3663. Secondly, and as described on the face of 15 U.S.C. 57(b), and as explained in *United States v. Figgie, supra*, the consumer redress is not punitive in nature and must be paid only in favor of a private consumer. Also, any of the listed items in Section 3(B) must be "indebtedness to the United States", which, again, does not apply to consumer redress. The last portion of Section 3(B) may also be applicable and prohib-

tive, because this consumer redress grows out of contracts "originally entered into by only persons other than the United States", which, in this case, would be the defendants and the alleged victimized franchisees.

Nothing more need be said - this collection Act simply does not apply to the Government's action and judgment for consumer redress. The following illustrative jurisprudence is in accord.

In the criminal case of *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), the First Circuit addressed squarely the issue of the collectability of criminal restitution under the FDCP A. The court ruled that the Act may not be used by the Government to collect arrearages that were ordered under the criminal provisions of the Child Support Recovery Act, 18 U.S.C. 228. Although the court rejected the defendant's challenge to the constitutionality of the CSRA, and held that it was a proper exercise of Congress' powers under the Commerce Clause, the civil collection procedures of the FDCPA were not available to the Government.

In *Bongiorno, supra*, the defendant/father was convicted criminally and ordered to pay restitution in the nature of child support, along with five years probation and other criminal punishment. The Government sought use of the FDCPA to enforce the restitution order for the child support. The district court agreed with the Government's use of the FDCPA and granted a writ of garnishment, similar to the Government's use of the judgment debtor rules, liens and seizure of property in the present case. The First Circuit disagreed and reversed the district court's use of FDCPA. The court reviewed the legislative history of the FDCPA, which was not effective until May 29, 1991, as well as its clear provisions, and stated that its collection procedures "will not apply to obligations which began as purely private loan or contract obligations". *Id.*, 1067 F.3d at 1036. Based on this review, the court concluded "that inclusion necessitates an

inquiry aimed at determining to whom the debt is owed and to whose benefit the proceeds of the debt will inure when it is paid. At the very least, a debt cannot qualify if both parts of this inquiry point toward exclusion: a debt cannot be eligible for inclusion under the FDCPA if the United States is neither the formal owner nor the direct beneficiary of it. In all events, the debt must clear an additional hurdle: it must be one that, in the parlance of that statute, is not owing under the terms of a contract originally entered into by only persons other than the United States." *Id.*, 106 F.3d at 1037. This inquiry and the conclusion that may be reached "is not dissipated merely because the Government's secured the restitution order... In this case, the Government is not the holder of the debt in any legally cognizable sense, and it seeks to collect restitution not to its own behoof but for the benefit of a private party (*Bongiorno's* daughter). Because of the restitution here - like the backpay award in *Nathanson* - involves no direct pecuniary interest of the federal sovereign, it does not create a debt owing to the United States within the meeting of the FDCPA." *Id.* 106 F.3d at Page 1039. The fact that the Government has an indirect interest of collecting child support for the general good does not show the requisite direct pecuniary interest sufficient for the "debt" to be collectable under the FDCPA. *Id.* It was also stated that, even though the listing in 28 U.S.C. 3002(3)(B), includes "restitution", it is not every order of restitution that qualifies under the FDCPA concept of "debt". The court explained that "[s]ome restitution orders create debts that owe beneficially to the federal government and thus fall within the purview of the FDCPA", but others, "...when paid, will not increase public revenues...[and] do not come within the statutory encincture... The federal government may collect under the FDCPA only restitution only that is "owing to the United States". 28 U.S.C. 3002(3)... Because restitution ordered under the CSRA is not owed to the United States in an economically meaningful sense, the Government cannot utilize the FDCPA

as a vehicle for collecting such awards." *Id.*, 106 F.3d at 1039.

Because the defendant was still responsible for restitution as a condition of his probation, the Government could utilize other remedies for collection, but not the provisions of the FDCPA. The court confirmed the criminal conviction and sentence in the criminal case, but dismissed the ancillary civil action for collection under the FDCPA.

The First Circuit again addressed this issue and reconfirmed the holding in *Bongiorno, supra*, in the case of *United States v. Rostoff*, 164 F.3d 63 (1st Cir. 1999). The defendant was convicted of bank fraud, false statements and conspiracy, for criminally victimizing a federally-insured bank. The defendant was sentenced to a term of imprisonment and restitution not to exceed $650,000.00. Two weeks prior to the end of supervised release, the Government filed civil proceedings under the FDCPA to collect on the unpaid portion of the restitution order. A trial was held and a civil judgment was entered. The court saw that restitution is one of the listed debts under 28 U.S.C. 3002(3)(b), and reasoned along with *Bongiorno, supra*, on whether the type of restitution was enforceable under the Act. The court reconfirmed the reasoning and holding of *Bongiorno* and said that, unlike *Bongiorno, supra*, which involved proceeds ultimately paid directly to a private party and not the Government, restitution under the Victim and Witness Protection Act, was entirely different. "In the instant case, by contrast, we are faced with an entirely different situation: the proceeds will go directly into the coffers of the FDIC." (Citations omitted.) *Id.*, 164 F.3d at 69. "Furthermore, the victim identified in the restitution order is the FDIC. Thus, neither the definitional exclusion nor the cited legislative history is apposite... The controlling question remains: who will receive the financial interest? In this case, it is the Government. Therefore, the FDCPA is a proper collection vehicle." *Id.*, 164 F.3d at Page 70.

In accordance with the reasoning of *Bongiorno, supra, and Rostoff, supra,* the Judgment of November 8, 1991, and the claims thereunder, were clearly not "debts" within 18 U.S.C. 3002(3)(b). First and foremost, unlike *Bongiorno, supra* and *Rostoff, supra*, the Judgment herein is not the result of any criminal restitution order. Secondly, the Government must transfer all funds collected to the individual victim consumers under this consumer redress judgment. Unlike *Rostoff, supra*, the Government cannot and will not keep or benefit from any portion of the Judgment.

The United States Fifth Circuit case of *United States v. Phillips*, 303 F.3d 548 (5th Cir. 2002) also bears upon this issue. The defendant was convicted by a jury on multiple felony counts and ordered to pay victim restitution under the Mandatory Victims Restitution Act, which would have been paid in favor of parties other than the Government. The defendant advanced the *Bongiorno, supra* case, stating that this restitution inured to the benefit of a private party and, therefore, outside of the confines of 28 U.S.C. 3002(3). The court found that *Bongiorno* was not persuasive, because it did not address the MVRA. Further, the court found that the MVRA, along with the FDCP A, arms the Government with the power to enforce criminal restitution, including the garnishment proceedings invoked by the Government in that case.

In the respect that *Bongiorno* requires an analysis of the type of restitution sought to be collected under the FDCPA, the Fifth Circuit does not, and seems to include all types of criminal restitution within the collection procedures of the Act. The Fifth Circuit agreed with the district court that it could "enforce private restitution actions through the FDCPA". *Id.*, at Page 550. However, it is most important to recognize that the "debt" in *Phillips, supra*, as well as *Bongiorno, supra* and *Rostoff, supra*, is necessarily criminal in nature and goes beyond even exemplary or punitive dam-

ages. It is for this reason that those courts' use of the FDCPA to collect criminal restitution has no bearing on the present case, which is entirely civil in nature under 15 U.S.C. 57(b), as discussed above. The Fifth Circuit's reasoning in *Phillips, supra*, would agree. "The legislative history further shows that the MVRA was drafted to 'strengthen the ability of the Government to collect' criminal restitution; it "consolidat [ed] and the procedures for the collection of unpaid restitution with existing procedures for the [Government's] collection of unpaid fines" and simultaneously "strengthen[ed] these procedures". ...The FDCPA provides a most effective means for the Government to enforce private victim restitution orders because it provides a uniform system for prosecutors to follow rather than resorting to the non-uniform procedures provided by the states...Congress drafted the MVRA with the intent that it would allow *prosecutors* to utilize the FDCPA to collect restitution in favor of private victims". (Emphasis added.) *Id.*, at Page 551.

In sum, the said Judgment of November 8, 1991, is purely and simply a judgment and order for consumer redress under 15 U.S.C. 57b, which necessarily means that all funds collected must be passed on to private parties. The Government has no lawful right to retain any of it and has no expressed intent to do so. Accordingly, it does not constitute a "debt", under the FDCPA, 28 U.S.C. 3002(3)(b). Further, the Judgment and its unlying obligations do not fit within any of the listed types of debts or any reasonable extension thereof. The Judgment does not constitute a fine, penalty or restitution, such as was the subject of the cases of *United States v. Bongiorno, supra, United States v. Rostoff, supra, and United States v. Phillips, supra.* The district court was seriously in error when it ruled in its Finding of Fact, Conclusions of Law and Order to Show Cause, January 27, 2003, that the FDCPA may be utilized by the Government to conduct judgment debtor rules and enforce collection of and execution under its November 8 1991, Judgment.

Because the said Judgment does not constitute a "debt", the lien provisions of the Act, 28 U.S.C. 3201, which provide viability for twenty years with the right of one renewal, do not apply. The Government must only rely on Rule 69, Federal Rules of Civil Procedure for enforcement of its judgment. This Rule provides that, unless a federal statute governs, which, in this case, it does not, the Government may seek execution of its judgment "in accordance with the practice and procedure of the state in which the district court is held...". The Government is, therefore, entitled only to use Louisiana law for collection under its judgment. According to Louisiana statutory law, Article 3501, Louisiana Civil Code, and Article 2031, Louisiana Code of Civil Procedure, the Government had ten years from November 8, 1991, to enforce or revive its judgment. The Government failed to do so and, in accordance with this Louisiana law, the Judgment "is prescribed by the lapse of ten years from the time the judgment" became final, which was on November 8, 1991, since an appeal was not perfected. Article 3501, Louisiana Civil Code.

The entire $3,019,377.00 Judgment, rendered by the district court on November 8,1991, by its own terms and the provisions of 15 U.S.C. 57(b), was completely based on redress to these private consumers and was being pursued by the Government under this Act. No portion of this Judgment may statutorily or otherwise be kept by the Government. Accordingly, the Fifth Circuit was mistaken when it stated, as follows:

> Although a portion of the judgment representing the damages awarded for consumer redress may ultimately be paid by the government to the defrauded franchisees, nothing in the statutory text requires that the government be the exclusive beneficiary of the judgment for the statute to apply. (Footnote 5 omitted.) (Emphasis added.) (*FTC v. Namer, supra*, 376 F.3d at Page 320.)

The entire Judgment, and not just "a portion", must be paid over to the alleged "defrauded franchisees". As pointed out by the Government in its original Brief, all sums recovered thus far, in the amount of $150,000.00, have been collected from the defendants and "forwarded to these private consumers..." (Pg. 2).

Separate and apart from this $3 million Judgment, the Government applied for and was awarded "costs of Thirty One Thousand Eight Hundred Fifty Eight and 19/100 ($31,858.19), plus attorney fees in the amount of Two Hundred Thirty Nine Thousand Six Hundred Twenty Four and No/100 Dollars ($239,624.00)". (See Order of December 17, 1992, FTC's Affidavit of Reasonable Fees and Costs, filed November 21,1991, and Bill of Costs, filed June 3, 1992.) Accordingly, if any recovery is payable to the coffers of the United States, it is only this additional amount for costs and attorney fees, and not the $3,019,377.00 judgment.

During the judgment debtor examination of Mr. Namer, on August 28, 2002, Mr. Namer described and answered questions regarding business relationships that he had with other entities. In its said Findings of Fact, Conclusions of Law and Order to Show Cause, of January 27, 2003, the court reviewed these business facts. The court concluded, as a matter of law, that the Act applied to alleged transfers and held that Mr. Namer's relationship with these other entities were wrongful and constituted unlawful transfers under the Act. (Vol. 31, Doc. 832, Pg. 9094) The court concluded that, "[t]he actions of Robert Namer are redressable under the Federal Debt Collection Procedure Act and/or Louisiana law and the court has the plenary authority to add, as judgment/debtors, the corporations involved in these schemes". (Pgs. 9098, 9099) The court does not cite the authority under Louisiana law giving it the "plenary authority" to add parties at will without motions by the judgment creditor. With regard to the court's review and determination

under the FDCPA, as stated above, the provisions regarding transfers, 28 U.S.C. 3301,3304, as cited by the court, do not apply, because the Judgment of November 8, 1991, is not a "debt" recognized under the Act and its provisions on transfer may not be utilized by the Government or the court. The court's review of these transfers and its opinion that they were somehow improper is statutorily defective and null and void.

During the course of the entire litigation, and particularly during the judgment debtor proceedings, the Government did not move or request to add additional parties-defendant as judgment creditors, including the business entities in which Mr. Namer was involved. Extraordinarily, however, the court on its own did so, as set forth in the court's Findings of Fact, Conclusions of Law and Order to Show Cause, January 27, 2003, and the Amended Judgment, April 8, 2003, over strenuous defense objections. (Vol. 31, Docs. 832, 851, Pgs. 8987, 9094) The Government even made clear to the court that it had not added additional parties. This was emphasized to the court when Government counsel told the court at the hearing on March 11, 2003, long after the August 28, 2002, judgment debtor examination, that "no additional corporations have been made defendants, so there was no action that the United States, at this point could take with respect to those corporations [referring to the parties added by the court, who are appellants herein.]". (Vol. 41, Doc. 855, Pg. 10) The court reviewed certain alleged transfers among the defendants and the other entities, under the provisions of the Act, and declared that Mr. Namer made use of these entities in a wrongful manner under the Act. (Vol. 31, Doc. 832, Pg. 9098) Based on this statutorily infirm review, the court added the outside entities as defendants.

The court was well aware during the judgment debtor examination on August 28, 2002, that the United States, as the plaintiff, had the right (pretermitting the inapplicability

of the Act to this collection) to add additional parties, as judgment debtors, under the Act, and did not elect to do so. As a matter of fact, the court strongly suggested and invited the Government to add these additional parties and even told the Government that, if it did so, the court would grant leave of court for the Government to amend its pleadings. It is noteworthy that the attorneys for the Government chose not to exercise such power or to accept the invitation, as no motion or leave of court to amend the pleadings or to otherwise reopen the matter to add additional judgment debtors appear in the record.

There is no provision in 28 U.S.C. 3013 or elsewhere allowing the court to add additional parties on its own. That power is not contained in 28 U.S.C. 3013. The only way that additional defendants, as judgment creditors, can be added is through the provisions of 28 U.S.C. 3012, and only by motion of "the United States or the debtor". There is no authority therein for the court to do so, unilaterally, and without a motion from the "United States or the debtor". Even if the court could add additional judgment debtors, those suspected would have to be properly petitioned with specific allegations and be allowed to responded and defend any allegations of asset transfers. The court would have to introduce specific evidence and testimony against each party as to the date and amount of any alleged asset transfer. The said Findings of Fact of January 27, 2003, followed by the court's order and reasons of April 3, 2003, and the Amended Judgment of April 8, 2003, constituted erroneous actions on the part of the district court.

The Fifth Circuit recognized the authority of the district court, under Section 3013 of the FDCPA, to initiate enforcement procedures. There is not one word in that statute, however, that permits the Court, on its own, to dispense with due process of law, service and citation of the complaint and any amended complaints, discovery and all other provisions under the Federal Rules of Civil Procedure,

which must be accorded before a judgment can be rendered against a defendant, and simply rule that other parties, related or not, must be joined as defendants to an already rendered and definitive money judgment. Yet, this is exactly what the district court did long after proceedings were initiated in 1989, service of pleadings to the original defendants, and multiple hearings and trials on the merits. The Court added these parties to a money judgment that can no longer be defended.

Further, there is not one bit of evidence in the record of the district court's judgment debtor proceedings to suggest the amount of any funds that were allegedly wrongfully transferred to any of these added defendants; yet, they were added in the amended judgment as joint defendants for the entire $3,019,377.00 judgment. There was no evidence to show that this amount or any amount of money was transferred to them whatsoever. The proper procedure might have been for the Government to initiate garnishment proceedings against these other entities, who may be liable unto the judgment debtors. The Government did not have to take this proper step, because the judge simply enveloped these defendants into the Judgment. There is no statutory procedure whatsoever permitting this judge to do so. The Fifth Circuit's interpretation of 28 U.S.C. 3013 would mean that any judge during any portion of a proceeding, without a motion or request by the plaintiff, may simply add other parties as defendants and make them liable for the entire amount of any judgment without due process of law. This was a clear and gross abuse of discretion by the district court. At the very least, this Honorable Court should remand these proceedings to the district court to determine the actual amount that has been allegedly wrongfully transferred to these additional defendants and render judgment solely for these limited and lower amounts, in the nature of a garnishment proceeding.

CONCLUSION

Contrary to the decisions in the First Circuit, the Fifth Circuit held private redress to a consumer to be a debt owed

to the Government for purposes of the FDCPA, 28 U.S.C. 3001, 3002. This private redress cause of action is in no way related to any funds owed to the United States, or even restitution under that Act. Further, the entire $3,019,377.00 judgment, if collected, must by law be paid over to the private consumers and will in no way enure to the financial benefit of the United States. Arguably, the only amounts collectible under the FDCPA are costs and attorney fees in the approximate amount of $270,000.00, because these funds may be kept by the Government. This is the only amount that could conceivably be collectable under the FDCPA. The district court was also without authority and abused its discretion when it unilaterally, without any input from the Government, added parties- defendant, for the gross amount of the Judgment, without any specification of the amounts received by these additional defendants or otherwise that they frustrated the Government's efforts. This overreaching violated everyone's rights. It may be a tough pill for the Government and the Court to swallow that the Government did not follow proper collection procedure and its judgment has expired under all pertinent laws, but that was the intent of Congress and should not be reformed or resurrected by the district court and the Fifth Circuit.

Respectfully submitted,

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BY: _____
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OCTOBER 29, 2004

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30282

FILED
AUG 02 2004

FEDERAL TRADE COMMISSION
Plaintiff - Appellee

v.

NATIONAL BUSINESS CONSULTANTS INC; ROBERT NAMER; VOICE OF AMERICA INC; AMERICA FIRST COMMUNICATIONS INC; NAMER INC; FRIENDS OF ROBERT NAMER
Defendants - Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

Before DAVIS, BENAVIDES, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

APPENDIX B

Westlaw.

376 F.3d 317
376 F.3d 317
(Cite as: 376 F.3d 317)

H
Briefs and Other Related Documents

United States Court of Appeals,
Fifth Circuit.

FEDERAL TRADE COMMISSION.
Plaintiff-Appellee,
v.
NATIONAL BUSINESS CONSULTANTS, INC.;
Robert Namer; Voice of America. Inc.;
America First Communications. Inc.; Namer, Inc.;
Friends of Robert Namer,
Defendants-Appellants.

No. 03-30282.

June 25. 2004.
Rehearing Denied Aug. 2, 2004.

Background: After obtaining judgment based on judgment debtor's violations of the Federal Trade Commission Act (FTCA) in the sale of business franchises. Federal Trade Commission (FTC) filed motion to conduct a judgment debtor examination under the Federal Debt Collection Procedure Act (FDCPA). The United States District Court

for the Eastern District of Louisiana, Peter Beer, J., issued amended judgment joining additional parties as defendants and finding them jointly and severally liable. Appeal was taken.

Holdings: The Court of Appeals, Benavides, Circuit Judge, held that:
(l) unpaid judgment owed to the FTC was a "debt" within meaning of FDCP A;
(2) FDCPA permitted district court to join additional entities as judgment debtors while conducting judgment debtor examination;
(3) evidence was sufficient to establish that debtor violated FDCPA; and
(4) FDCPA could be applied retroactively to action that was pending on its effective date.

Affirmed.

West Headnotes

[1] United States ==75.5
393k75.5 Most Cited Cases

Unpaid judgment owed to the Federal Trade Commission (FTC) as result of judgment debtor's violation of the Federal Trade Commission Act (FTCA) in the sale of business franchises was a "debt" within meaning of the Federal Debt Collection Procedure Act (FDCPA); although a portion of the judgment representing damages awarded for consumer redress could ultimately be paid by the government to defrauded franchisees, FDCPA did not require that government be exclusive beneficiary of the judgment. 28 U.S.C.A.

§ 3002(3)(B); Federal Trade Commission Act, § 1 et seq., 15 U.S.C.A. § 41 et seq.

[2] United States ==75.5
393k75.5 Most Cited Cases

Federal Debt Collection Procedure Act (FDCPA) permitted district court to join additional entities as judgment debtors while conducting judgment debtor examination under the FDCPA, despite absence of motion by the United States or the original judgment debtor. 28 U.S.C.A. §§ 3012, 3013.

[3] United States ==75.5
393k75.5 Most Cited Cases

Evidence that payments were made to judgment debtor's corporations in lieu of payment to debtor for his services and that debtor made loans to another entity in an effort to avoid collection of the judgment against him was sufficient to establish that debtor engaged in the transfer of income and assets calculated to hinder, delay, and avoid collection of the judgment against him, in violation of the Federal Debt Collection Procedure Act (FDCPA). 28 U.S.C.A. § 3304.

[4] Evidence ==96(I)
157k96(1) Most Cited Cases

An affirmative defense places the burden of proof on the party pleading it.

[5] United States ==75.5
393k75.5 Most Cited Cases

Federal Trade Commission's (FTC) claims challenging judgment debtor's allegedly fraudulent transfers under the Federal Debt Collection Procedure Act (FDCPA) were required to be filed within six years of the transfers, or within two years of learning of the transfers. 28 U.S.C.A. § 3306(b)(1).

[6] United States ==75..5
393k75.5 Most Cited Cases

Federal Debt Collection Procedure Act (FDCPA) could be applied retroactively to action that was pending on its effective date. Crime Control Act of 1990, § 3631(b)(1), 28 U.S.C.A. 3001 note.

[7] United States ==75.5
393k75.5 Most Cited Cases

Provision of the Federal Debt Collection Procedure Act (FDCPA) requiring government to file a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed in order to secure a lien did not limit other remedies available to the United States. 28 U.S.C.A. § 3201.

***318** Scott Ramsey McIntosh (argued), U.S. Dept. of Justice, Civ. Div.- App. Staff, Washington, DC. for Plaintiff-Appellee.

Edward J. Castaing. Jr, (argued), Crull, Castaing, Lilly & Herma, New Orleans. LA, for Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before DAVIS, BENAVIDES and PRADO,
Circuit Judges.

BENAVIDES, Circuit Judge:

Defendants-Appellants appeal from the district court's Amended Judgment of April 8, 2003 that amended a 1991 Judgment in favor of Plaintiff-Appellee Federal Trade Commission ("FTC") against Defendants-Appellants National Business Consultants. Inc. ("NBC") and Robert Namer. The Amended Judgment added: (l) Name, Inc.; (2) America First Communications. Inc.; (3) Voice of America, Inc.; and (4) Friends of Robert Namer (collectively, the "Additional Parties") as additional defendants and judgment debtors. Finding no error, we affirm. [FN1]

FN1. Appellants prematurely flled a notice of appeal before a final judgment was entered in this case. The FTC moved to dismiss the original appeal for lack of jurisdiction. The district court subsequently entered a final judgment, and Appellants timely flled a notice of appeal from that judgment. In light of the proper filing of the instant appeal, the first appeal is now moot, and we dismiss it as such.

I. BACKGROUND

[I] In 1989, the FTC sued Defendants-Appellants Robert Namer and NBC. a corporation wholly-owned by Namer, under the Federal Trade Commission Act ("FTCA "), specifically the sections codified at 15 U.S.C. §§ 45(a), 53 (b). and 576, and the FTC's Franchise Rule, 16 C.F.R § 436.1. At the time, Namer and NBC were engaged in the nation-wide sale

of business franchises. The FTC alleged that Namer and NBC made numerous material misrepresentations to potential franchisees, made unsupported earnings claims, failed to provide required supporting documentation, and failed to make required disclosures. The FTC sought injunctive and monetary relief to redress the losses suffered by defrauded franchisees. Following a bench trial on the issue of liability, the district court found in favor of the FTC. In November 1991, the district court entered a judgment rendering Namer and NBC jointly and severally liable to ***319** the FTC for three million dollars, which represented the relief and damages awarded for consumer redress. In addition. the district court awarded pre-judgment interest. attorneys' fees and costs.

In July 2002, the FTC filed a motion to conduct a judgment debtor examination of Namer pursuant to the Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C.A. §§ 3001-3308 (West 2004). and Rule 69(a) of the Federal Rules of Civil Procedure. The FTC sought to determine whether Namer had any assets that could be obtained to satisfy the judgment. Based upon evidence presented during the January 2003 examination, the district court found that Namer made use of three closely held entities–Namer, Inc., America First Communications, Inc., and Voice of America, Inc.–"for the calculated purpose of frustrating the Federal Trade Commission from enforcing the judgment in its favor." *Federal Trade Comm'n v. Namer*, No. 89-1740, 2003 WL 193503, at *3 (E.D.La. January 27, 2003). Concluding that the unpaid judgment owed to the FTC constituted a "debt" owed to the United States, the district court also found that Namer violated the FDCPA "by purposefully transferring income and assets" to those entities "and by incurring

debt and making loans" to a fourth entity– Friends of Robert Namer–that were "calculated to hinder, delay and avoid collection of the judgment against him." *Id.*

Based upon these findings, the district court ordered the Additional Parties to show cause why they should not be named as parties and as judgment debtors under the FDCPA, Louisiana law, or both. Representatives from the prospective defendants did not appear at the show cause hearing. Counsel for the Additional Parties submitted affidavits on behalf of America First Communications, Inc., Voice of America, Inc., and Namer, Inc. Finding that neither Namer nor the Additional Parties showed cause as to why the judgment should not be amended to include them, the district court issued an Amended Judgment joining the Additional Parties as defendants and finding them jointly and severally liable, along with Namer and NBC, to the FTC for the judgment. Appellants timely appealed.

II. DISCUSSION

A. Debt owing to the United States under the FDCPA

Appellants argue that the FTC cannot rely on the FDCPA enforcement provisions because the money judgment does not constitute a "debt," as defined by the Act. In addressing this claim, we review a district court's statutory construction *de novo*. *United States v. Phillips*, 303 F.3d 548, 550 (5th Cir. 2002).

The FDCPA applies only to amounts owing as debts. 28 U.S.C. § 3001 (c). The FDCPA defines "debt" as:

> an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal

> property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States.

Id § 3002(3)(B). Appellants assert that the money judgment is not "owing to the United States" because it represents relief and damages awarded for consumer redress that the FTC must pass on to the defrauded franchisees. [FN2]

> FN2. Appellants primarily rely upon *United States v. Bongiorno*, in which the First Circuit held that the federal government could not collect certain child support payments via the FDCPA because the debt was "not owed to the United States in an economically meaningful sense." 106 F.3d 1027, 1039 (1st Cir. 1997). The First Circuit held that "a debt cannot be eligible for inclusion under the FDCPA if the United States is neither the formal owner nor the direct beneficiary of it." *Id* at 1037. Although we decline to adopt the First Circuit view of "economic meaningfulness" because it entails a more narrow use of debt than the statute contemplates, Appellants' claim fails even if considered under this rubric. The FTC is the formal owner of the entire debt and beneficial owner of that portion of the judgment representing costs and attorneys fees. Moreover, the FTC is the only entity entitled to enforce the judgment.

***320** We agree with the district court that the FDCPA applies in this action because the unpaid judgment owed to the FTC constitutes a debt owing to the United States. [FN3] "When interpreting a statute, we look first and foremost to its text."

United States v. Alvarez-Sanchez, 511 U.S. 350, 356, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994). The relevant text is clear and unambiguous. The FDCPA applies to "an amount that is owing to the United States." 28 U.S.C. § 3002(3)(B). The terms of the judgment render Appellants jointly and severally liable to the FTC, not to private individuals, for the entire amount of the judgment. [FN4] The FTC is considered the United States for purposes of the FDCPA *See id* § 3002(15)(B). Therefore, the United States, not any individual or group of individuals, is the formal owner of the judgment.

FN3. Although we previously held in *United States v. Phillips* that the government can use the FDCPA to enforce victim restitution orders in favor of a private party under the Mandatory Victims Restitution Act, we left open the precise question raised here. 303 F. 3d 548, 550-51 (5th Cir.2002).

FN4. The original Judgment rendered Namer and NBC "liable jointly and severally unto the plaintiff, Federal Trade Commission," for the sums specified in the judgment. Likewise, the Amended Judgment leaves the quantum of the judgment undisturbed and runs "in favor of the plaintiff, Federal Trade Commission."

Although a portion of the judgment representing the damages awarded for consumer redress may ultimately be paid by the government to the defrauded franchisees, nothing in the statutory text requires that the government be the exclusive beneficiary of the judgment for the statute to apply. [FN5]

FN5. Relying on *NLRB v. E.D.P. Medical Computer Systems, Inc.*, the FTC argues that it "acts in the public's

interest," and "serves as more than a mere conduit when it initiates an action" to collect a judgment for consumer redress. 6 F.3d 951, 955 (2d Cir.1993) (holding that because the National Labor Relations Board acts in the public's interest when it initiates an action to collect a backpay award, such award constitutes a debt owing to the United States under the FDCPA). Although we do not find it necessary to rely on the public interest argument, our decision in this case is consistent with the Second Circuit's view.

B. Authority to join the Additional Parties as judgment debtors

[2] Appellants alternatively assert that, even if this case involves a "debt" for purposes of the FDCPA, the district court lacked authority to join the additional entities as defendants and judgment debtors absent a motion by the United States or the debtor. Appellants concede that the addition of parties as judgment debtors is permitted under section 3012 of the FDCPA upon motion of the "the United States or the debtor." 28 U.S.C. § 3012. [FN6] ***321** Appellants overlook the import and language of section 3013 of the FDCPA.

FN6. Though the statute does not explicitly contemplate amending the judgment to render the parties judgment debtors, we need not decide this issue as Appellants concede that the statute allows for such action. The statute provides: "The United States or the debtor may join *as an additional defendant* in an action or proceeding under this chapter any person reasonably believed to owe money ... to the debtor arising out of the transaction or occurrence giving rise to the debt." 28 U.S.C. § 3012 (emphasis added).

Although section 3012 speaks only to the ability of the United States or the debtor to join additional defendants, section 3013 of the FDCP A provides:

"The court may at any time on its own initiative or the motion of any interested person, and after such notice as it may require, make an order denying, limiting, conditioning, regulating, extending, or modifying the use of any enforcement procedure under this chapter." 28 U.S.C. § 3013. Because section 3013 grants the district court broad discretion to, among other things, modify the use of any enforcement procedure under the FDCPA, we review for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (indicating that matters of discretion are reviewable for abuse of discretion). "A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence." *United States v. Mann*, 161 F.3d 840, 860 (5th Cir. 1998). Because section 3013 authorizes the district court to extend or amend the use of any enforcement procedure under the statute, the district court's modification, taken upon its own initiative and with notice to the interested parties, did not exceed the discretion contemplated by the statute. We find no abuse of discretion in the exercise of the district court's authority to join additional defendants.

C. The finding that Appellants engaged in a fraudulent transfer of assets

[3] Having determined that the district court could allow joinder of additional parties on its own motion, we address Appellants' challenge to the district court's factual finding that Namer engaged in the transfer of income and assets "calculated to hinder, delay, and avoid collection of the judgment

against him" in violation of the FDCPA. [FN7]

FN7. Appellants challenge the district court's finding of actual intent under 28 U.S.C. § 3304. Appellants assert that the district court only considered section 33O4(b)(2)(A) & (B), although other factors "may well mitigate the finding and conclusion of actual intent to defraud." (Appellant Br. at 42.) Although the statute permits the court to consider other factors, it does not so require. *See* 28 U.S.C. § 33O4(b)(2) ("In determining actual intent under paragraph (1), consideration *may* be given, *among other factors*, [those factors listed in (A)-(K)]") (emphasis added). Appellants also challenge the finding that the transfer was made "with actual intent to hinder, delay, or defraud a creditor," under section 3304(b)(1)(A), and assert that section 3304(b)(l)(B), which applies to transfers made "without receiving a reasonably equivalent value in exchange for the transfer or obligation," "would appear to be the more appropriate conclusion of law." (Appellant Br. at 43.) Because the transfer was fraudulent under section 3304(b)(I)(A), however, it is irrelevant that the transfer may also have been fraudulent under section 33O4(b)(I)(B).

"We review a district court's findings of fact for clear error and will not reverse a finding of fact unless a review of the entire record leaves us with the definite and firm conviction that a mistake has been committed." *Couch v. Cro-Marine Transp.*, 44 F.3d 319, 327 (5th Cir .1995) (internal quotation and citation omitted). The evidence in the record adequately supports the district court's finding. There was evidence that assets were transferred directly or indirectly to Voice of America. Inc., America First Communications, Inc., and

Namer, Inc. in lieu of payments to Namer for his services. Not only is it apparent from the record that these transfers were made to the various corporate entities on Namer's behalf, it is also readily apparent that ***322** this was done in an effort to frustrate the satisfaction of the judgment at issue. [FN8] There was also sufficient evidence in the record to show that Namer made loans and contributions to Friends of Robert Namer in an effort to avoid collection of the judgment against him. Namer has pointed to nothing in the record that causes us to question the district court's findings, let alone find them clearly erroneous. [FN9)

FN8. After averring under oath that he was not paid for his services, Namer cryptically stated, "I said that while I am aware that the FTC has been doing for thirteen years, it would not physically be profitable for me to work for anything." (Tr. of Hearing of Aug. 28, 2002, at 62-63.)

FN9. Appellants also challenge the district court's "apparent disregard" of affidavits submitted by Namer, Inc., Voice of America, and America First Communications, Inc., which Appellants allege show no improper or actionable asset transfers or inadequate consideration for services performed by Appellant Namer. These affidavits are hearsay under Rule 801 of the Federal Rules of Evidence.

They do not qualify as a hearsay exception under either Rule 803 or Rule 804. Under Rule 802, "[h]earsay is not admissible except as provided by [the Federal Rules] or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Accordingly, any claim that the district court failed to adequately consider the affidavits is without merit.

D. FDCPA statute of limitations for fraudulent transfers [FN10]

FN10. In one sentence, Appellants assert that they are entitled to the defense in 28 U.S.C. § 3307(f)(2). (Appellant Br. at 43.)

However. it is not clear to us how the defense is applicable here, and Appellants inadequately briefed this issue. *Cinel v. Connick*, 15, F.3d 1338, 1345 (5th Cir. 1994) ("A party who inadequately briefs an issue is considered to have abandoned the claim.").

Appellants assert that all of the transfers in this proceeding fall outside of the relevant statute of limitations period. [FN11]

FN11. 28 U.S.C. § 3306(b) provides:
A claim for relief with respect to a fraudulent transfer or obligation under this subchapter is extinguished unless action is brought–
(1) under section 3304(b)(1)(A) within 6 years after the transfer was made or the obligation was incurred or, if later, within 2 years after the transfer or obligation was or could reasonably have been discovered by the claimant;
(2) under subsection (a)(1) or (b)(l)(B) of section 3304 within 6 years after the transfer was made or the obligation was incurred; or
(3) under section 3304(a)(2) within 2 years after the transfer was made or the obligation was incurred.

[4][5] A statute of limitations defense is an affirmative defense. *See* Fed.R.Civ.P. 8(c). An affirmative defense places the burden of proof on the party pleading it. *See United*

States v. Cent. Gulf Lines, Inc., 974 F.2d 621, 629 (5th Cir.1992). The transfers fall under section 3304(b)(1)(A). To avail themselves of the relevant statute of limitations defense for a particular transfer, therefore, Appellants must prove that the FTC's claim was brought more than six years after the transfer was made or more than two years after the transfer was or could reasonably have been discovered by the FTC. 28 U.S.C. § 3306(b)(1).

Namer's limited testimony did not establish that the transfers occurred more than six years prior to the commencement of this action. Moreover, even if one or more of the transfers occurred more than six years prior, the evidence failed to call into question the FTC's assertion that it did not learn of the transfers until August 2002, within two years of seeking relief. Likewise, Appellants do not allege that the FTC could reasonably have discovered the transfers any earlier. Accordingly, Appellants have failed to meet their burden of proof.

***323** *E. Appellants' remaining claims*

[6] Appellants. final two contentions are without merit. Appellants make a cursory assertion, without argument, that the FDCPA may not be applied retroactively. Although the issue is not adequately briefed, it is also without merit. In enacting the FDCPA, Congress provided that the Act "shall apply with respect to actions pending on the effective date of this Act [May 29. 1991]." Pub.L. No. 101-647, § 363l(b)(1), 104 Stat. 4789, 4966 (1990). The original complaint in this action was filed on April 19. 1989. The judgment in this case was entered on November 8, 1991. Therefore, the action was pending on May 29, 1991, and the FDCPA may be applied.

Appellants have not made a constitutional challenge to the statute. Accordingly, this claim is unavailing.

[7] Appellants also briefly argue that under 28 U.S.C. § 3201, the lien created by the district court's judgment applies only to real property and not to personal property. However, the district court's order merely joined the Additional Parties as judgment debtors and did not undertake to place a judicial lien on any property. To secure a lien in accordance with 28 U.S.C. § 3201, the FTC must file "a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed." Nothing in this provision, however, limits other remedies available to the United States.

III. CONCLUSION

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

Briefs and Other Related Documents (Back to top)

* 03-30282 (Docket)

(Mar. 24, 2003)

END OF DOCUMENT

APPENDIX C

Westlaw.

Not Reported in F.Supp.2d
2003 WL 1797891 (E.D.La.)
(Cite as: 2003 WL 1797891 (E.D.La.))

H
Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.

FEDERAL TRADE COMMISSION
v.
NATIONAL BUSINESS CONSULTANTS

No. Civ.A. 89-1740.

April 3, 2003.

ORDER AND REASONS

BEER, J.

***1** This matter came on for hearing April 2, 2003, present were Justin Zitler on behalf of **Robert Namer** and the parties named in the Rule, Eneid Francis and Paul Weidenfeld, on behalf of the Federal Trade Commission. The Court finds that neither **Robert Namer** nor the parties who have been served with the order to show cause (Namer, Inc., America First Communications, Inc., Voice of America. Inc. and Friends of **Robert Namer**) have shown cause why the judg-

ment should not be amended to include the additional parties named above.

The contentions set forth by Namer and the parties sought to be included as judgment debtors are without merit. The contentions seeking recusal of this Court are also non-meritorious.

From the earliest days of this Court's participation in this matter, the Court has tried, again and again, to convince Namer that he should have counsel in these proceedings. Each step along the way, the Court has gone into significant detail to explain the benefits of counsel, and has repeatedly sought to have Namer reconsider his position in this matter. On August 28, 2002, the Court again went into detail as to the extra protections and precautions that would be available to Namer if he would arrange for counsel. Nevertheless, Namer again came to court representing himself. Late that afternoon, after a long day of questioning by the government, Namer turned to the Court and said he had changed his mind about counsel and that he needed a lawyer. The Court gave Namer substantial time to obtain the services of counsel. It was only in the last few days of that term that the Court was informed by Mr. Justin Zitler that he might represent Namer.

This information came in a somewhat unusual way, in that Mr. Zitler came to the court's chambers and was somewhat obsequious in his suggestion that he did not want to take the case if the Court would think ill of him. The Court informed Mr. Zitler that the Court's feeling was quite the contrary. The Court' had constantly sought for Namer to obtain counsel and the Court greatly appreciated the fact that Mr. Zitler might take the case for all of the reasons previously stated.

Additionally, Namer's constant attacks on the Court and his attacks on the Court's family, which had often been aired by Namer in radio broadcasts, made it essential for the Court to be absolutely sure Namer's case was handled fairly and even-handedly. The Court welcomed and appreciated Mr. Zitler entering the case.

Mr. Zitler said that he was accustomed to handling unpopular causes from his services rendered to the Anti-Defamation League and the ACLU and that he had some sympathies with Namer because they were coreligionists. The Court indicated to Mr. Zitler that it was certainly in order for him to iterate these facts to the Court, but as far as the Court could see, he (Zitler) shouldn't expect any good will to emanate from Namer on this account, since some of Namer's attacks via his radio programs were leveled against the same citizens as were traditionally targeted by serial candidate David Duke.

Not Reported in F.Supp.2d
2003 WL 1797891 (E.D.La.)
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***2** Mr. Zitler entered the case and proceeded ably in Namer's behalf, clearly sharing with Namer the Court's observations noted above. When in the course of the hearings, it came time for Mr. Zitler's motions filed in behalf of Namer to be argued, they were each considered by the Court and though carefully drafted and succinctly stated, were, nonetheless, nonmeritorius.

After Mr. Zitler's various motions had been argued and subsequently overruled, Mr. Zitler informed the Court that his client wished to file a motion on his own, which he (Zitler)

was not filing, but was only "notarizing" Namer's signature. At that point, Namer put forward a one-page document over his own signature (which is in the record), seeking the Court's recusal.

This case has a long and acrimonious history starting with Namer's attacks on the Honorable Veronica Wicker and in like manner, upon the Honorable Charles Schwartz, Jr. The Court will spare the record of the details of those attacks, except to say that in each instance, they resulted in the judge taking himself or herself out of the case and sending it to the clerk's office for re-allotment. It is the resolve of this Court to see this matter through, fairly and evenhandedly, all other considerations to the contrary notwithstanding. I have not and will not waver from this commitment nor will I let the impartial and evenhanded administration of justice be ham-strung by calculated personal attacks against my family and myself. Part of the overall responsibility of serving as United States District Judge is to do one's job fairly and impartially. That is what I have done and will continue to do.

With respect to Namer's request for reasons (for purposes of appeal) for the Court's finding that subject matter jurisdiction exists under the Federal Debt Collection Procedure Act, the Court observes that although this debt may, in some respects, inure to the benefit of those private individuals who were cheated by Namer, it is nonetheless susceptible to collection through the FDCPA. This debt is similar to the restitution order in the Fifth Circuit case of *United States v. Phillips*, 303 F.3d 548 (5th Cir.2002). In addition, this debt, although inuring in come respects to the benefit of those parties who had been cheated, could not go forward toward collection without the intervention of the Federal Trade Commission,

the named plaintiff in this action. *See NLRB v. E.D.P. Med. Computer Sys. Inc.*, 6 F.3d 951 (2d Cir.1993).

At the hearing of this matter on April 2, 2003, Mr. Zitler requested leave of court to file three "affidavits" to which the government objected on the basis that the Rule to Show Cause was an open court proceeding whereby defendants and
prospective defendants would have an opportunity to come forward–take the oath and give testimony. This, the prospective defendants have failed to do and, consequently, the so-called affidavits are subject to a best evidence rule objection. Nevertheless, the Court has permitted them to be filed for the benefit of any reviewing court. These affidavits are unpersuasive in any respect insofar as this Court is concerned. [FN1]

FN1. "Affiants" indicate that they are "afraid of testifying in this court." Afraid of what? Perhaps "affiants" have concluded that their filing of affidavits "on information and belief" obviates the possibility of exposure to serious consequences if their testimony was given in court under oath.

*3 The Motion for Stay is DENIED. It is time to put this show on the road. The government is requested to submit a judgment consistent with this order.

2003 WL 1797891 (E.D.La.)

END OF DOCUMENT

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed
JAN 27 2003

FEDERAL TRADE COMMISSION * CIVIL ACTION

VERSUS * NO. 89-1740

ROBERT NAMER * SECTION M

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TO SHOW CAUSE

This matter came for hearing on a Motion to Examine Judgment Debtor brought by plaintiff, the Federal Trade Commission. The Federal Trade Commission is a judgment creditor of defendants National Business Consultants, Inc. and Robert Namer, jointly and severally, in the sum of $3,019,377.00, by virtue of a judgment entered on November 8, 1991.

The Federal Trade Commission, pursuant to the Federal Debt Collection Procedure Act, 28 U.S.C. § 3001, et seq., Federal Rule of Civil Procedure 69, and Louisiana law, conducted an examination of the judgment debtor on November 20, 2002. The proceedings were interrupted by Robert Namer, who, in response to questions about a safety deposit box, pled the Fifth Amendment and requested a continuance to seek legal counsel.

The matter was reconvened on January 8, 2003 with counsel, Justin Zitler, Esq., present representing Robert Namer. Objections by counsel to the further examination of the Judgment Debtor were overruled, as was counsel's motion for immediate appeal.

DATE OF ENTRY Jan 28 2003

Then, Robert Namer's motion for recusal of the judge (made in proper person and only "handed to the Court" by counsel) was taken under advisement. That motion, having been considered by the Court, is **DENIED.**

The Court, having considered the record in this matter together with the testimony adduced at the various hearings, makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Robert Namer testified under oath to the following:

1. Robert Namer is self-employed as a consultant for R. Namer Management, Inc. and does consulting, broadcasting, editorials, news, and investigative reporting. (T. p. 38-39).

2. Robert Namer was the general manager of WASO radio station until he began campaigning for elected office. He also broadcasts on WASO, by virtue of an agreement between WASO and Voice of America, Inc. (T. p. 39).

3. Robert Namer's wife, Barbara Namer is the sole owner of Voice of America, Inc., located at 3313 Kingman Street, Metairie, Louisiana. (T.p. 42). Robert Namer is the president

of Voice of America, Inc. (T. p. 41-42). Voice of America receives income from consulting fees, advertising fees, and revenues for professional services. (T. p 65). Voice of America also designs and sells internet sites for politicians. (T. p. 66). Robert Namer has given consulting advice to political candidates who in lieu of payment to Robert Namer, bought radio time on WASO. (T. p. 80-81). Voice of America receives 25% of the "gross profit" of WASO, an arrangement negotiated with WASO by Robert Namer. (T. p. 50-52). Barbara Namer does not work for Voice of America, but has a full-time job with Jefferson Parish. (T. p. 56-57).

4. America First Communications, Inc. holds the license to operate WASO and America First Communications, Inc. is synonymous with WASO. (T. p. 47-48). Namer, Inc. is part owner (40%) of America First Communications, Inc. (WASO) (T. p. 44- 47).

5. Namer, Inc. is wholly owned in equal shares by Robert Namer's five children. (T. p. 7, 44, 112-113).

6. Namer, Inc. did not purchase its stock in America First Communications, Inc., but rather received stock in exchange for its management services. (T. p. 62).

7. Namer, Inc. also owns the property located at 3313 Kingman Street, which is leased by American First Communications, Inc., Voice of America, Inc. and/or WASO. One of the Namer related entities has paid $11,000 per month in rent for the past ten years. (T. p. 117-118).

8. Namer, Inc. acquired this property on approximately June 20, 2001, making a $20,000 down payment, which was paid

by Robert Namer and his wife. (T. p. 113-116).

9. That arrangement was negotiated with American First Communications, Inc. by Robert Namer. (T. p. 51).

10. America First Communications, Inc.'s (WASO's) sole source of revenue is advertising. (T. p. 53). Barbara Namer is a signatory on WASO's checking accounts and is the secretary of American First Communications, Inc. (T. p. 55,57).

13. Robert Namer has not been paid for his work by American First Communications, Inc. or Namer, Inc. because "it would not be physically profitably for [him] to work for anything." (T. p. 63).

14. Robert Namer was a candidate for a federal office. (T. p. 101).

15. Pursuant to the Federal Election Commission forms, he loaned $31,500 to Friends of Robert Namer. He made an in kind contribution of $8,000, in the form of a down payment on a recreational vehicle to be used by the campaign. He personally financed the remaining balance of $33,000. (T. p. 102-109).

16. Friends of Robert Namer made cash disbursements to America First Communications totaling $14,000 as payment for Robert Namer's radio show, which could be considered advertising. The treasurer of Friends of Robert Namer negotiated this price with the WASO station manager, who was Robert Namer. (T. p. 108-109).

II. CONCLUSIONS OF LAW

1. The Federal Trade Commission is a judgment creditor of Robert Namer and National Business Consultants, Inc. by virtue of the unpaid judgment entered into the record of this matter in the amount of $3,019,377.00.

2. The Court has subject matter jurisdiction because the unpaid judgment owed to the Federal Trade Commission is a "debt" owed to the United States as defined by the Federal Debt Collection Procedure Act, 28 U.S.C. § 93001, et seq.

3. Discovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure.

4. Federal Rule of Civil Procedure 69(a) provides that:

> In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

5. The scope of post-judgment discovery is broad to permit a judgment creditor to discover assets upon which execution may be made. Federal Deposit Insurance Corp. v. LeGrand, 43 F.3d 163, 172 (5th Cir.1995).

6. Under the Federal Debt Collection Procedure Act, a "[t]ransfer means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with an asset or an interest in an asset, and includes payment

of money, release, lease, and creation of a lien or other encumbrance," 28 U.S.C. § 3301(6).

7. A transfer is fraudulent if the debtor makes the transfer or incurs the obligation with actual intent to hinder, delay, or defraud a creditor. 28 U.S.C. § 3304(b)

8. In determining actual intent, consideration may be given to whether the transfer or obligation was to an insider or the debtor retained possession or control of the property transferred after the transfer. 28 U.S.C. § 3304(b)(2).

9. The Federal Debt Collection Procedure Act provides that: "The court may at any time on its own initiative or the motion of any interested person, ... make an order denying, limiting, conditioning, regulating, extending, or modifying the use of any enforcement procedure under this chapter." 28 U.S.C. § 3013.

Considering the foregoing findings of fact and conclusions of law, the Court finds that Robert Namer has made use of Namer, Inc., America First Communications, Inc. and Voice of America for the calculated purpose of frustrating the Federal Trade Commission from enforcing the judgment in its favor.

Further, the Court finds that Robert Namer has, accordingly, violated the Federal Debt Collection Procedure Act by purposefully transferring income and assets to Namer, Inc., America First Communications, Inc., Voice of America, Inc., and by incurring debt and making loans to Friends of Robert Namer calculated to hinder, delay and avoid collection of the judgment against him. The actions of

Robert Namer are redressable under the Federal Debt Collection Procedure Act and/or Louisiana law and the Court has the plenary authority to add, as judgment-debtors, the corporations involved in these schemes.

Accordingly, **IT IS ORDERED** that Namer, Inc., America First Communications, Inc., Voice of America, Inc. and Friends of Robert Namer appear and show cause on the **11th day of March, 2003 at 9:30 a.m.**, at the **U.S. Courthouse, 500 Camp Street, New Orleans, Louisiana, Room C102,** why they should not be named as parties to this matter and cast as judgment debtors under the Federal Debt Collection Procedure Act and/or Louisiana Law.

IT IS FURTHER ORDERED that a copy of this Order shall be served by the U.S. Marshal on Namer, Inc., America First Communications, Inc., Voice of America, Inc. and Friends of Robert Namer. *

New Orleans, Louisiana, this 27 day of January, 2003.

/s/ Peter Beer
Peter Beer
United States District Judge

* U.S. Attorney's Office to provide Marshal with appropriate addresses.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION	* CIVIL ACTION
v.	* NO. 89-1740
NATIONAL BUSINESS CONSULTANTS, ET AL	* SECTION "M"

* * *

Filed Apr 8 2003

AMENDED JUDGMENT

Considering the Order and Reasons entered by this Court on April 3, 2003,

IT IS HEREBY ORDERED that the judgment entered on November 8, 1991 in favor of the plaintiff, Federal Trade Commission, and against the defendants, National Business Consultants, Inc. and Robert Namer, be amended to join Namer, Inc., America First Communications, Inc., Voice of America, Inc. and Friends of Robert Namer as additional parties;

IT IS FURTHER ORDERED that there be judgment in favor of the plaintiff, Federal Trade Commission, and against the defendants, National Business Consultants, Inc., Robert Namer, Namer, Inc., America First Communications, Inc., Voice of America, Inc., and Friends of Robert Namer, jointly and severally, in the sum of $3,019,377.00.

New Orleans, Louisiana, this 8th day of April, 2003.

/s/ Peter Beer
UNITED STATES DISTRICT JUDGE

(2)

No. 04-602

In the Supreme Court of the United States

ROBERT NAMER, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether money owed to the Federal Trade Commission (FTC) pursuant to a civil judgment for violations of the Federal Trade Commission Act and the FTC's Franchise Rule is a "debt" for purposes of the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3301 *et seq.*

2. Whether the Federal Debt Collection Procedures Act of 1990 authorizes a district court on its own motion to join as defendants persons who participate in fraudulent transfers.

3. Whether the district court abused its discretion in joining additional defendants as a remedy for their participation in fraudulent transfers by the original defendant.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2002) 2

FTC v. *Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir.), cert. denied, 456 U.S. 973 (1982) 3

Holloway v. *Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1972) 2

Moore v. *New York Cotton Exch.*, 270 U.S. 593 (1926) 2

NLRB v. *E.D.P. Med. Computer Sys., Inc.*, 6 F.3d 951 (2d Cir. 1993) 12

Red Diamond Supply, Inc. v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir.), cert. denied, 454 U.S. 827 (1981) 2

United States v. *Bongiorno*, 106 F.3d 1027 (1st Cir. 1997) 8, 11

United States v. *Phillips*, 303 F.3d 548 (5th Cir. 2002), cert. denied, 537 U.S. 1187 (2003) 5

Statutes, regulations and rule: Page

Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, Tit. XXXVI, § 3611, 104 Stat. 4933 (28 U.S.C. 3001 *et seq.*) 5
28 U.S.C. 3001(a)(1) 5
28 U.S.C. 3001(c) 5
28 U.S.C. 3002(3)(A) 9
28 U.S.C. 3002(3)(B) 5, 8
28 U.S.C. 3003(f) 5
28 U.S.C. 3012 12
28 U.S.C. 3013 ..... 9, 12, 13
28 U.S.C. 3101-3105 6
28 U.S.C. 3201-3206 6
28 U.S.C. 3301-3308 6
28 U.S.C. 3304(b)(1)(A) 6
28 U.S.C. 3306(a)(3) 6
Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:
15 U.S.C. 45 (§ 5) 2, 3, 4
15 U.S.C. 45(a)1 1
15 U.S.C. 45(a)(2) 2
15 U.S.C. 52(b) 2
15 U.S.C. 53 (§ 13) 2, 3
15 U.S.C. 55(a) 2
15 U.S.C. 57a(a)(1)(B) 2
15 U.S.C. 57b (§ 19) 3
15 U.S.C. 57b(a)1 3
15 U.S.C. 57b(b) 3

Regulations and rule—Continued: Page

16 C.F.R.:
Section 436.1 2
Section 436.1(a)(1)-(24) 2
Section 436.1(b)-(e) 2
Fed. R. Civ. P. 69(a) 6

In the Supreme Court of the United States

No. 04-602

ROBERT NAMER, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-16b) is reported at 376 F.3d 317. The opinions of the district court (Pet. App. 1c-5c, 1d-7d) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2004. A petition for rehearing was denied on August 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 5(a)(1) of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1). Congress has authorized the Federal Trade Commission (FTC) to

enforce that prohibition and to prescribe rules that "define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. 45(a)(2), 57a(a)(1)(B).

In 1978, the FTC promulgated the Franchise Rule, which prohibits franchisors from engaging in certain unfair or deceptive acts "[i]n connection with the advertising, offering, licensing, contracting, sale, or other promotion * * * of any franchise." 16 C.F.R. 436.1. The Franchise Rule makes it an unfair or deceptive act or practice to fail to disclose specified financial information regarding the franchise being offered for sale. 16 C.F.R. 436.1(a)(1)-(24). The Rule also makes it an unfair or deceptive act or practice to make representations about specific levels of sales, income, or profit of existing or prospective franchise outlets without having a reasonable basis for such representations and without making supporting materials available for review by the prospective franchisee. 16 C.F.R. 436.1(b)-(e).

No private right of action exists to seek judicial redress for violations of Section 5. *Moore* v. *New York Cotton Exch.*, 270 U.S. 593, 603 (1929); *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001, 1008 n.13 (5th Cir.), cert. denied, 454 U.S. 827 (1981); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). Nor is private judicial relief available for violations of the Franchise Rule. See *Alexander* v. *Sandoval*, 532 U.S. 275, 291 (2001) (regulation may not create private right of action in absence of legislative authorization). Instead, the federal government has exclusive authority to seek judicial relief.

When a violation of the FTC Act takes the form of false or misleading advertising, Section 13 of the Act authorizes the FTC to seek preliminary and permanent injunctive relief. 15 U.S.C. 53; see 15 U.S.C. 52(b), 55(a)

(making dissemination of false advertising an unfair or deceptive practice and defining false advertising to mean advertising "which is misleading in a material respect"). Under Section 13, the district court may exercise "the full range of equitable remedies traditionally available to it." *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir.), cert. denied, 456 U.S. 973 (1982). In addition, when any person violates any rule respecting unfair or deceptive acts or practices, Section 19 of the FTC Act authorizes the FTC to bring a civil action against the violator and vests district courts with jurisdiction "to grant such relief as the court finds necessary to redress injury to consumers or other persons * * * resulting from the rule violation." 15 U.S.C. 57b(a)(1) and (b).

2. In April 1989, the FTC commenced a civil action against petitioners Robert Namer and National Business Consultants, Inc. (NBC), for violations of Section 5 of the FTC Act and the Franchise Rule. At the time that the complaint was filed, Namer was engaged in the sale of business franchises on a national basis. The FTC alleged that Namer had made numerous material misrepresentations to potential franchisees, had made unsupported earnings claims, had failed to provide required supporting documentation, and had failed to make required disclosures within time limits set by the Franchise Rule. C.A. R.E. Tab 2, at 3-7. The FTC sought injunctive relief against further violations and monetary relief to redress the losses suffered by consumers who were injured by petitioners' illegal acts. The FTC sought relief under both Section 13 and Section 19 of the FTC Act, 15 U.S.C. 53, 57b. C.A. R.E. Tab 2, at 1, 8.

Following a trial, the district court found that Namer and NBC had committed numerous knowing violations of Section 5 of the FTC Act and the Franchise Rule. See C.A. R.E. Tab 3, at 1-21. Specifically, the court found that Namer and NBC offered bogus references to prospective clients, falsely told prospective clients that they would have exclusive territorial rights, and repeatedly misinformed prospective consultants that they would not have to market or sell their services because NBC would refer clients to them. *Id.* at 7-9, 12-13. Moreover, Namer and NBC required consultants to pay a "performance deposit" of as much as $7500 with the promise that the deposit would be refunded when the consultants earned $50,000, but failed to disclose that "very few ever obtained a partial refund of their performance deposits, and that fewer still ever obtained a full refund because few associate consultants ever realized $50,000 in annual earnings for NBC." *Id.* at 4, 10. Based on its findings, the district court entered a permanent injunction restraining Namer and NBC from further violations of Section 5 and the Franchise Rule. C.A. R.E. Tab 7.

Following further proceedings on FTC's request for monetary relief, the court found that franchisees had paid Namer and NBC performance deposits or bonds ranging from $750 to $7500; that they had done so in reasonable reliance on Namer's misrepresentations and omissions; and that they were entitled to "be put in the same position with respect to such deposits that they would have been in had their reasonable expectations been fulfilled, i.e., a full refund of the 'performance deposits.'" C.A. R.E. Tab 4, at 9-13. Based on these findings, the district court entered a judgment rendering Namer and NBC "liable jointly and severally unto

the plaintiff, Federal Trade Commission, in the sum of $3,019,377.00, representing the relief/damages awarded for consumer redress, plus pre-judgment interest from date of judicial demand and attorneys' fees and costs." *Id.* Tab 5, at 5889. The sums owed under the judgment for interest, attorneys' fees and costs were not fixed in the judgment itself, but were specified by the district court in a subsequent order. See R. 7320-7323 (order entered Dec. 17, 1992) ($875,619.34 in prejudgment interest, $163,650.23 in postjudgment interest, $239,624 in attorney's fees, and $31,858.19 in costs).

3. To collect the judgment, the FTC relied on the provisions of the Federal Debt Collection Procedures Act of 1990 (FDCPA or Act), 28 U.S.C. 3001 *et seq.* The FDCPA provides a comprehensive set of civil procedures "for the United States * * * to recover a judgment on a debt." 28 U.S.C. 3001(a)(1). Except as otherwise provided by the FDCPA, the Federal Rules of Civil Procedure apply to all actions and proceedings under that Act. 28 U.S.C. 3003(f).

The Act's procedures apply only to "debts." 28 U.S.C. 3001(c). The Act defines "debt" to include "an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States." 28 U.S.C. 3002(3)(B).

The FDCPA's purpose is to provide the United States with a uniform set of federal procedures for recovering debts and to relieve the government from having to "resort[] to the non-uniform [debt collection] procedures provided by the states." *United States* v.

Phillips, 303 F.3d 548, 551 (5th Cir. 2002), cert. denied, 537 U.S. 1187 (2003). Toward that end, the Act establishes a panoply of federal pre-judgment and post-judgment remedies. See 28 U.S.C. 3101-3105 (pre-judgment remedies); 28 U.S.C. 3201-3206 (post-judgment remedies). In addition, the Act provides procedures relating to fraudulent transfers. 28 U.S.C. 3301-3308. A transfer made or obligation incurred by a debtor is fraudulent for purposes of the FDCPA if the debtor makes the transfer or incurs the obligation "with actual intent to hinder, delay, or defraud a creditor." 28 U.S.C. 3304(b)(1)(A). When a fraudulent transfer occurs, the United States may obtain avoidance of the transfer, a remedy against the transferred asset or other property of the transferee, or "any other relief the circumstances may require." 28 U.S.C. 3306(a)(3).

4. The FTC commenced its efforts to collect the judgment debt soon after the district court entered its final judgment. Over the following 12 years, Namer made repeated efforts to frustrate the FTC's collection efforts. Thus far, the FTC has been able to collect only approximately $150,000 under the judgment, leaving more than 95% of the amount awarded by the district court unpaid. As a matter of discretion, the FTC has disbursed substantially all of the collected money to Namer's former franchisees. The FTC has yet to receive any reimbursement under the judgment for its own costs and attorneys' fees, which amount to almost $300,000.

In July 2002, the FTC filed a motion under Federal Rule of Civil Procedure 69(a) to conduct a judgment debtor examination to discover whether Namer had any further assets that could be used to satisfy the judgment. The examination disclosed that Namer had

entered into evasive financial arrangements with petitioners Namer, Inc., America First Communications, Voice of America, and Friends of Robert Namer, all of which were controlled by Namer and his family members. C.A. R.E. Tab 12, at 9095-9097. Based on the evidence presented during the examination, the district court found that Namer "has made use of Namer, Inc., America First Communications, Inc., and Voice of America for the calculated purpose of frustrating the Federal Trade Commission from enforcing the judgment in its favor." *Id.* at 9098. The court further found that Namer has "purposefully transferr[ed] income and assets to Namer, Inc., America First Communications, Inc., [and] Voice of America, Inc.," and has "incurr[ed] debt and ma[de] loans to Friends of Robert Namer calculated to hinder, delay and avoid collection of the judgment against him." *Ibid.* Accordingly, the court ordered those petitioners to show cause "why they should not be named as parties to this matter and cast as judgment debtors." *Id.* at 9099.

In April 2003, the district court issued an order formally providing for the joinder of Namer, Inc., America First Communications, Voice of America, and Friends of Robert Namer as defendants and judgment debtors. C.A. R.E. Tab 18, at 8990. The court entered an amended judgment that formally added the new defendants as judgment debtors. C.A. R.E. Tab 19, at 8987. The court rejected petitioners' argument that the judgment was not a "debt" under the FDCPA and therefore could not be enforced through the Act's procedures. C.A. R.E. Tab 18, at 8992-8993.

5. The court of appeals affirmed. Pet. App. 2b. The court of appeals agreed with the district court that the judgment constitutes a "debt" under the FDCPA. *Id.* at

7b-10b. The court noted that the Act's definition of "debt" encompasses "an amount that is owing to the United States." *Id.* at 9b (quoting 28 U.S.C. 3002(3)(B)). The court held that the judgment constituted an amount owed to the United States because "[t]he terms of the judgment render [petitioners] jointly and severally liable to the FTC, not to private individuals, for the entire amount of the judgment," making "the United States, not any individual or group of individuals, * * * the formal owner of the judgment." *Ibid.* The court added that the government's entitlement to costs and attorneys' fees also made the government a beneficial owner of the judgment, and that while a portion of the judgment "may ultimately be paid by the government to the defrauded franchisees, nothing in the statutory text requires that the government be the exclusive beneficiary of the judgment for the statute to apply." *Ibid.*

The court of appeals rejected petitioners' argument that the judgment would not constitute a "debt" under the test adopted by the First Circuit in *United States* v. *Bongiorno*, 106 F.3d 1027 (1997). In *Bongiorno*, the First Circuit held that "a debt cannot be eligible for inclusion under the FDCPA if the United States is neither the formal owner nor the direct beneficiary of it." *Id.* at 1037. While the Fifth Circuit declined to adopt that test, it pointed out that petitioners' argument "fails even if considered under this rubric," because the FTC "is the formal owner of the entire debt and beneficial owner of that portion of the judgment representing costs and attorneys fees." Pet. App. 8b n.2.

The court of appeals also rejected petitioners' contention that the FDCPA did not authorize a district court to join additional defendants on its own motion.

Pet. App. 10b-11b. The court relied on 28 U.S.C. 3013, which expressly authorizes a district court, "on its own initiative," to "extend[] or modify[] the use of any enforcement procedure under [the Act]." The court of appeals reasoned that this provision granted the district court broad remedial discretion and that, in the circumstances before it, the district court did not abuse that discretion by acting on its own initiative to join petitioners as defendants. Pet. App. 10b-13b.

ARGUMENT

Petitioner Namer enlisted the aid of four other petitioners in an ongoing effort to avoid satisfying the multi-million dollar judgment against him arising out of his violations of the Federal Trade Commission Act and the FTC's Franchise Rule. The decision below holds that the district court had the authority under the Federal Debt Collection Procedure Act (FDCPA) to join those petitioners as defendants and judgment debtors because of their participation in fraudulent transfers of Namer's assets. That holding is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ certiorari should therefore be denied.

1. a. Petitioners contend (Pet. 18-20) that the judgment in this case does not create a "debt" to the United States within the meaning of the FDCPA and that the district court therefore lacked authority to use the FDCPA's enforcement procedures. That contention is without merit. The FDCPA defines a "debt" as "an amount that is owing to the United States," 28 U.S.C. 3002(3)(A), and, as the court of appeals explained, the judgment in this case satisfies that definition for two reasons. First, because the terms of the judgment

render petitioner liable to the United States, not to the victims of Namer's fraud, the United States is the "formal" owner of the entire judgment debt. Pet. App. 9b. Second, because a portion of the judgment is intended to compensate the government for its costs and attorneys' fees, *id.* at 8b n.2, the United States is also a "beneficial" owner of the judgment debt. *Id.* at 9b. And, as the court explained, "nothing in the statutory text requires that the government be the exclusive beneficiary of the judgment for the statute to apply." *Ibid.*

Petitioners assert (Pet. 19) that the entire amount of the judgment is intended to compensate Namer's defrauded franchisees. But even if that were so, that would not affect the court of appeals' first ground for holding that the judgment creates a debt owing to the United States—that the United States is the formal owner of the entire debt. In any event, petitioners' assertion that the entire judgment is intended to provide relief to Namer's victims is incorrect. By its express terms, the judgment encompasses "attorneys' fees and costs" to compensate the government for its litigation costs. C.A. R.E. Tab 5, at 5889. It therefore is not the case that "any amounts collected under the judgment must be paid over to private parties" (Pet. 2). To the contrary, the government itself has a direct financial stake in the proceeds of the judgment.

Petitioners mistakenly suggest (Pet. 26) that the obligation to reimburse the FTC for attorneys' fees and costs does not arise from the judgment, but instead from a subsequent order of the district court. While a post-judgment order fixed the specific amount owed under the judgment for attorneys' fees and costs, the original judgment created the obligation to pay that sum. C.A.

R.E. Tab 5. In any event, the scope of the district court's judgment is a factbound question of no recurring importance and therefore does not warrant review.

b. Petitioners err in contending (Pet. 16) that review is warranted because the decision below conflicts with the First Circuit's decision in *United States* v. *Bongiorno*, 106 F.3d 1027 (1997). In *Bongiorno*, the First Circuit held that the United States could not use the FDCPA to collect an award of criminal restitution on behalf of a private victim because the debt was "not owed to the United States in an economically meaningful sense." *Id.* at 1039. The First Circuit reasoned that "a debt cannot be eligible for inclusion under the FDCPA if the United States is neither the formal owner nor the direct beneficiary of it." *Id.* at 1037.

The court of appeals in this case viewed *Bongiorno*'s reference to "economic meaningfulness" as "entail[ing] a more narrow use of debt than the statute contemplates." Pet. App. 8b. But its resolution of this case did not depend on that conclusion. To the contrary, in holding that the judgment in this case created a debt to the United States, the court relied on the very grounds that the First Circuit identified as legitimate—that the United States is the formal owner of the judgment debt and that it is a direct beneficiary of it. Compare *id.* at 9b, with 106 F.3d at 1037. Thus, the Fifth Circuit and the First Circuit both agree that the FDCPA applies in a case like this one. While it is possible that a case might arise in the future in which the Fifth Circuit would conclude that the FDCPA applies even though the

First Circuit would not, that possibility is not a reason to grant review in this case.*

2. Petitioners argue briefly (Pet. 27-28) that, even if the judgment in this case constitutes a "debt" under the FDCPA, the Act did not authorize the district court to join the participants in Namer's fraudulent transfers as defendants and judgment debtors. Petitioners concede that 28 U.S.C. 3012 authorizes defendants to be added on the motion of the United States, but argue that the district court had no authority to do so on its own initiative. As the court of appeals pointed out, however, 28 U.S.C. 3013 vests a district court with unqualified authority to "extend[] or modify[] the use of any enforcement procedure" under the Act and to do so "at any time on its own initiative."

Petitioners argue that Section 3013 does not expressly authorize the joinder remedy adopted by the district court. That argument ignores the breadth of the authority granted by the provision. Section 3013 authorizes district courts to extend or modify "*any* enforcement procedure" established by the Act, a grant of authority that necessarily includes modifying the procedure for adding defendants set forth in Section 3012.

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* In *NLRB* v. *E.D.P. Medical Computer Systems, Inc.*, 6 F.3d 951, 955 (1993), the Second Circuit held that a backpay award issued under the National Labor Relations Act is a debt to the United States because the NLRB acts in the public interest when it collects that award. In *Bongiorno*, the First Circuit disagreed with the Second Circuit's analysis. 106 F.3d at 1037-1038. Because the court of appeals in this case did not rely on the Second Circuit's public-interest rationale, see Pet. App. 9b n.5, this case does not present the question that divides the First and Second Circuits.

Even if petitioners had more substantial grounds for arguing that Section 3013 does not authorize the joinder of defendants on a district court's own initiative, that issue would not warrant review by this Court. Petitioners do not cite any other case in which a district court's authority to join additional defendants on its own initiative under Section 3013 has been at issue. Thus, petitioner has failed to show that the issue is one of recurring or general significance.

3. Finally, petitioners argue (Pet. 28-29) that, under the circumstances of this case, the district court should not have joined the participants in Namer's fraudulent transfers as defendants and judgment debtors. Given the role played by the remaining petitioners in Namer's efforts to evade enforcement of the judgment, and given the extent to which those petitioners are subject to the control of Namer and his family members, the district court had ample grounds for obligating all of the petitioners to share responsibility for satisfying the judgment. See C.A. R.E. Tab 12, at 9094-9099. In any event, the question whether the district court properly exercised its discretion in joining the remaining petitioners as defendants is factbound and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2005